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The AMPLA Model Joint Venture Agreements and Associated Documents

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SUMMARY

This Paper presents and explains the considerations behind how each of the AMPLA Model Exploration Joint Venture Agreements (Minerals) and their associated documents was constructed.

The AMPLA Model Joint Venture Agreements, Farmin Agreement, Farmout Agreements and Deeds of Assignment and Assumption (in both multi-party and single party versions) form a comprehensive package of documents in excess of 220 pages for unincorporated joint venture minerals exploration projects.

Each Model was drafted by the author, with the active assistance of a consultative group of highly respected, senior resources lawyers from around Australia, all of whom are recognised for their expertise, experience and integrity in this field.

As with the AMPAL Model Mining Services Contract, these AMPLA Models are intended to provide a flexible, generic and modular starting point for the parties to structure their own arrangements in any jurisdiction in Australia.

BACKGROUND

Following the domestic and international acceptance and success of the AMPLA Model Mining Services Contract, the AMPLA Board, at its meeting on 14 July 2006, commissioned a new Reference Group to develop an AMPLA Model Joint Venture Agreement (Minerals) for non-complex minerals projects using an unincorporated structure.

Work commenced immediately with the aim that an agreed outline of the Exposure Draft be approved in time to be announced at the 2006 AMPLA Conference held in Melbourne on 18-21 October 2006.

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To narrow the focus and make the task more achievable, the AMPLA Board determined that the initial Joint Venture Models cover only Exploration and related activities, rather than extend to cover all aspects of a minerals resources project. While this decision simplified the task of the Reference Group, and reflected current practice particularly among smaller companies, it inevitably raised a number of boundary questions addressed below.

The AMPLA Board also sought a model for an unincorporated joint venture as this is the most common structure in Australia for mineral exploration joint ventures.

The Reference Group initially set as its target, with the approval of the Board, the completion of a Model 3 party Exploration Joint Venture Agreement (JVA). Once a first draft of this agreement was prepared and discussed, a majority of members of the Reference Group, especially those from Western Australia, formed the view that a Model 2 party Exploration Farmin Joint Venture Agreement was more needed and likely to be used by smaller companies. It was proposed to the Board at its mid-September 2006 meeting that work on both Models proceed simultaneously. As work was proceeding rapidly, the Board readily agreed to this extension of the mandate to include both Models.

PREPARATION OF THE JOINT VENTURE MODELS

Once the Reference Group was established, the process by which the Model JVA was developed was that each member was asked to provide to myself, as Project Leader, their best exploration joint venture precedents on a strictly confidential basis. I then reviewed all the precedents in detail, selected the framework I considered optimal, and prepared a discussion draft derived from the best and most comprehensive clauses from the precedents submitted, bearing in mind the objective of its use in a non-complex project. In doing so, I rearranged and redrafted all the selected clauses to make them distinctive from their antecedents and to arrange them in a logical sequence consistent with normal practice. Because of the need to avoid cross-referencing (see below) it was necessary to relocate some clauses from their traditional place in a JVA.

The result was a draft Model which had no recognisable precedent and was a new work for all intents and purposes. No confidential or proprietary clauses were used in the text of the draft Model.

The first draft Model was circulated to Reference Group members for review and comment, with an Explanatory Memo. As could be expected from such a distinguished group, the comments were many and varied and showed great insight into exploration joint venture drafting and practice.

Following the first rounds of comments and corrections, a second draft and further Discussion Memoranda were prepared and circulated for further review and comment. All comments by members of the Reference Group were considered and responded to in writing. Most were incorporated in the next draft.

As a result we were able to isolate significant matters of principle. Each of the matters of principle were addressed in Group Memos which were circulated and discussed in depth with each Reference Group member. Some of the issues required detailed research.

Two further drafts were prepared by the Reference Group before the draft Model was forwarded to the AMPLA Board on 26 September 2006 for adoption at its meeting on 17 October 2006. Following initial Board endorsement, an outline of the Exposure Draft was then presented to members on Friday 19 October 2006 at the Annual Conference. Following its meeting, the Board appointed a Board sub-committee which reviewed the Reference Group draft in detail and sought further improvements.

In all this process:

- some 10 Memoranda discussing issues were circulated to the Reference Group;
- a further six Board Memoranda were prepared discussing issues arising in the drafting or reporting on various matters;
- the draft Model JVA went through eight revisions responding to comments

before a Model Exploration Joint Venture Agreement was finally adopted as an Exposure Draft and published on the AMPLA web site on 3 December 2006 for members' comment.

PRINCIPLES UNDERLYING THE JOINT VENTURE MODELS

At the outset, the Reference Group resolved to adopt the same approach used in the preparation of the Model Mining Services Contract, that is:

- the Model JVAs would not be a rigid precedent to be adopted without amendment;
- the agreements would be generic and include representative provisions across all matters normally covered in such an agreement;
- they would be applicable to exploration for all minerals in all States and Territories;
- they would be a comprehensive guide and checklist for all normal matters usually covered in a basic joint venture or associated agreement;
- the Models would strike a consistent and fair balance between the parties on contentious issues; and
- in striking a balance between the parties, preference would be given to the result which had the effect of keeping the Joint Venture together and facilitating the achievement of its objectives, rather than promoting or facilitating the interests of any particular party.

To achieve these purposes, the AMPLA Models endeavour to provide a flexible, generic and modular starting point for the parties to structure their own arrangements. In particular:

- there is no cross-referencing, to allow for easy amendment and substitution of clauses;
- all the essential commercial and technical variable provisions for a particular document are put in a schedule, wherever possible, to preserve the integrity of the basic Model and to make it easy to adopt and cross check the additions and amendments;
- the drafting style is modern plain English, principally in the present tense; and
- the technical formatting is neutral (MSWord Times New Roman 11.5 pitch), which is widely available and easily able to be manipulated by the draftsperson or secretary.

In any particular agreement, a party is likely to have its own preferred clauses, schedules or forms, which can be easily inserted. Examples of such clauses are in the functions, powers and duties of Manager, Management Committee meetings, Programs and Budgets, reporting, assignment, default, and issue resolution clauses. Such alternatives can be inserted in the Model with minimum amendment, except for the need to conform defined words and phrases.

The Models are prepared in simple form, without bells and whistles. The adaptation of a Model to a particular situation is part of the value to be added by the practitioner using the Model. This allows for an independent exercise of care and judgment in tailoring the agreement to the client's requirements and the circumstances. It is envisaged that it will only be in rare instances that a Model will be adopted without discussion and amendment.

FURTHER MODELS DEVELOPED FROM THE MODEL JOINT VENTURE AGREEMENT

To simplify use of the Joint Venture Models, the Reference Group resolved for the 3 party Model JVA and the 2 party farmin Model JVA to have identical provisions, except for the additional farmin clauses (in clause 2.1 of the Farmin JVA, entitled "Farmin prior to Joint Venture").

Subsequently the Reference Group resolved to propose to the AMPLA Board that it prepare:

- a short form stand alone Farmin Agreement with the Model 2 party Farmin JVA attached; and
- a Model Farmout Agreement from the 3 party JVA, plus a Model Deed of Assignment & Assumption. This was later varied to include a Multi Party and a Single Party version of each Farmout Agreement and Deed of Assignment &

Assumption, the Multi Party and the Single Party version having distinctly different focuses which are discussed below.

The AMPLA Board progressively approved preparation of all these Model Agreements, and have also asked the Reference Group to prepare a Model Deed of Cross Charge and a Model Permitted Chargee's Deed of Covenant. Exposure drafts of both these last Deeds are at an advanced stage of preparation, but have not yet been published.

Following independent review by a Board sub-committee and approval by the AMPLA Board, the following Model Agreements have now been published as Exposure Drafts on the AMPLA website.[1]

1. AMPLA Model Exploration 3 party Joint Venture Agreement (Minerals) Version 1, EXPOSURE DRAFT, 3.12.06.

2 AMPLA Model Exploration 2 Party Farmin Joint Venture Agreement (Minerals) Version 1, EXPOSURE DRAFT, 3.12.06.

3. AMPLA Model Farmin Agreement (Minerals) Version 1, EXPOSURE DRAFT, 22.2.07.

4. AMPLA Model Farmout Agreement (Minerals) (Multi-party) EXPOSURE DRAFT, 5.09.07.

5. AMPLA Model Deed of Assignment and Assumption (Multi-party) EXPOSURE DRAFT, 5.09.07.

6. AMPLA Model Farmout Agreement (Minerals) (Single Party) EXPOSURE DRAFT, 5.09.07.

7. AMPLA Model Deed of Assignment and Assumption (Single Party) EXPOSURE DRAFT, 5.09.07.

Once these Exposure Drafts have been reviewed and commented upon by AMPLA members, including at this Conference, final Versions will be adopted and placed on the AMPLA website.

The next step will be, if approved by the AMPLA Board, to expand and improve the usefulness of the Models to include optional and alternative clauses, and specific clauses applicable to different types of operations and minerals, as has been done with the Model Mining Services Agreement.

STRATEGIC JOINT VENTURE REFERENCE GROUP DECISIONS

While the decision of the AMPLA Board to limit the initial Joint Venture Models to Exploration and related activities simplified the task of the Reference

1 www.ampla.org.

Group, and reflected current practice particularly among smaller companies, it inevitably raised a number of boundary questions addressed below.

The first question was: where do you draw the boundary line between Exploration and Mining? The Reference Group decided, after considerable discussion, to draw the boundary line at the feasibility study stage, before or just as a formal joint venture decision is made to proceed to Mining.

In addition the Reference Group addressed and resolved the following other specific issues, which will be discussed in more detail below:

- Inclusion of a definition of "Expenditure" limited to "Exploration" only
- Exclusion of Cross Charges
- Exclusion of Sole Risk provisions
- Exclusion of a full Accounting Procedure, covering matters such as accounting systems, asset acquisition, allocation and disposal, related party transactions and the like
- Exclusion of an Area of Mutual Interest (AMI) clause
- Adoption of a limited "good faith" clause for Joint Venturers, but full "good faith" for the Manager
- Exclusion of a non-cash consideration pre-emption clause of proposed transfer
- Adoption of forced transfer provisions on default without compensation in some circumstances
- Omission of an index of single use definitions.

It is likely that the excluded clauses will be provided in later versions as Optional Clauses for the Exploration JVA or in a Mining JVA.

It was also resolved at an early stage to include full suite of provisions regarding the Manager, rather than propose a separate Management Agreement, an arrangement which is not uncommon, especially where the Affiliate of a Joint Venturer acts as Manager. An advantage of this approach was to eliminate the need for often awkward cross-referencing between these Agreements.

SCOPE OF THE CURRENT JOINT VENTURE AGREEMENT

The Model JVAs contain all the terms normally found in a basic joint venture agreement, including:

- Conditions precedent
- Establishment of Joint Venture, including objects, rights, obligations and liabilities
- Joint Venture property and interests

- The Manager, its functions, rights, powers and duties
- The Management Committee, its function, meetings, voting and decision making
- Programs, Budgets and Called Sums, billings and payments
- Joint Venture accounting, reporting, audit and access
- Dilution and withdrawal (but not sole risk)
- Assignment and pre-emption
- Default and termination
- Confidentiality, publicity and disclosure
- Issue Resolution and Expert Determination
- Force Majeure, GST, notice and other normal ancillary provisions.

All the basic particulars and other variable provisions are included in Schedules. The basic particulars set out in Schedule 1 include the applicable Minerals, the relevant Mining Act, the applicable State law, the voting passmark at JV meetings (including unanimous matters) and the limit on the Manager's discretionary contracting powers. The list of Tenements and their particulars is set out in Schedule 2.

The Joint Venture is established once the Conditions Precedent are satisfied, with an optional termination provision if these are not satisfied within six months from the date of the agreement.

The objects of the Model Joint Venture are to maintain the Tenements and explore the JV Area for Minerals and, if exploration indicates the probable existence of a commercially mineable Mineral resource in any part of the JV Area, carry out a Feasibility Study, including the construction and operation of a pilot plant to test the feasibility of a production process.

The scope of Joint Venture activities under the agreement do not extend to mining or any other activity, unless unanimously agreed. If the Management Committee decides to proceed to mining, a separate Mining Lease Area is identified which becomes the subject of a separate Mining Joint Venture Agreement on the same terms and conditions as the Exploration JV, with such modifications as the Joint Venturers agree.

ISSUES ARISING DURING PREPARATION OF THE MODEL JVA

The Boundary Between Exploration and Mining in a Joint Venture Agreement

The boundary line in a joint venture between Exploration and Mining is difficult to define and is often blurred in practice because it is part of a continuum, an inter-linked decision-making process in which a number of separate milestones must be achieved before the Mining Project proceeds to full Development.

As noted above, the Reference Group decided to draw the boundary line at the feasibility study stage, just before a decision is made to proceed to Mining, whether by all or some of the Joint Venturers.

Clause 3.2(b) of the Model JVA provides that "the scope of Joint Venture Activities under this agreement does not extend to Development or Mining or any other activity, unless all Joint Venturers otherwise agree in writing." Joint Venture Activities can include exploration declines and test mining, and/or the construction and operation of a pilot plant to test the feasibility of a production process.

In practice, if a promising ore body is discovered, a number of feasibility studies of increasing depth, complexity and comprehensiveness, may prepared before the Joint Venture actually moves from the Exploration phase to the Mining phase. These feasibility studies are often prepared for different purposes and with different audiences in mind. Preliminary, scoping or pre-feasibility studies may be prepared, at different stages of the decision making process, for consideration first by the Manager's internal management, then by the Joint Venture Management Committee, then by the main Boards of the Joint Venturers before a full feasibility study is undertaken. The process often takes several years, or more. During this time other feasibility studies may be prepared for Government agencies or local authority information, for shareholder and public information, but usually none of these feasibility studies are sufficient for an unconditional decision to mine to be made.

How the Model JVA draws the boundary line between Exploration and Mining is:

1. by defining "*Exploration*" as including "exploration declines; test mining; analysis and evaluation of activities undertaken and results obtained, conducting preliminary feasibility studies, preparing Feasibility Studies reports…";

2. the term "*Feasibility Study*" is then defined as meaning:

   > "a study of the technical, commercial and economic feasibility of Development and Mining in the JV Area and producing Minerals in significant commercial quantities which includes …
   >
   > (d) an economic evaluation of the proposed Development, Mining and Treatment and the marketing and sale of the Minerals including a comparative analysis of the effect of various assumptions, financing methods, operating costs and taxation; and
   >
   > (e) a schedule of relevant Authorisations required to be obtained before Mining may commence"

3. "*Expenditure*", for the purpose of being included in a Program and Budget to be funded by the Joint Venturers is defined as including "expenditure in respect of the Exploration and Feasibility Study phases of the Joint Venture …"

For brevity and simplicity the definition of "Feasibility Study" in the Model:

- encompasses the whole feasibility process and includes scoping and pre-feasibility study stages (more detailed feasibility process provisions are possible and common in mineral exploration JVAs);
- can include a range of separate studies in considerable depth and may include one or more reports from independent experts with skills relevant to the development of the Mine; and
- does not contain any "bankable" requirement in relation to the final feasibility study upon which any development decision can be based.

The costs of all of the Feasibility Studies may, if the Joint Venturers so decide, be included in Exploration Programs and Budgets under the Exploration JVA and be financed accordingly.

None of these phases in the Model Exploration Joint Venture include Expenditure on actual "Development" (*the development of a commercial Mining operation for Minerals*) or "Mining" (*all operations associated with the extraction and Treatment of Ore on a commercial basis, including pre-stripping, and removal and disposal of overburden and waste*). It is these operations which will be the subject of a separate Mining JVA over a Mining Lease Area which is carved out of the Exploration JVA. The Exploration JVA will continue to operate over the remainder of the Tenement Areas to allow for continuing exploration to occur in those areas (see clause 3.3(e)), while Development and Mining of the orebody proceeds.

Notwithstanding the Model JVA extends only to Exploration, clause 4.2(a) provides that

> "if Minerals are extracted from the JV Area, title to and the risk of loss of, or damage to, those Minerals passes to each Joint Venturer in proportion to its Percentage Share at the point where the Minerals are first extracted."

It is important to note that this provision applies to the Exploration phase as well as the Mining phase, to cover the ownership of minerals extracted during testing programs as well as Development and Mining.

In an unincorporated joint venture this is the normal boundary between Joint Venture Activities and the independent commercial activities of the individual Joint Venturers.

As noted above, Exploration under the Model JVA includes excavating exploration declines, test mining, and/or building a pilot plant to test the feasibility of a production process. If a particular Joint Venturer wishes to extend the scope of the Model Exploration JVA, or cover other activities, the parties will need to amend the Model JVA.

The Reference Group also decided to omit an Area of Mutual Interest (AMI) clause for the reason that these are less common these days. Under an AMI clause, parties to a joint venture agree that they will not take up or acquire an interest in mining tenement (usually adjacent to the JV area) except as Joint Venture

Property, or they will offer the interest to the Joint Venturers first. It is proposed that a Model AMI clause will be included in optional clauses, after adoption of the formal Model JVA.

Moving from Exploration to Development and Mining

The Model JVA, in clause 3.3(a), provides a process for the Exploration Joint Venturers to proceed from Exploration to Development and Mining by adopting a Development Proposal in relation to a Mining Lease Area (ML Area) at a Management Committee meeting. A separate Mining JVA over the ML Area is then established on the same terms and conditions as the Model Exploration JVA, with such modifications as the Joint Venturers may agree.

Some of the modifications which could be agreed by Joint Venturers are indicated by what the Reference Group decided to leave out of the Model Exploration JVA. These include cross charges, sole risk, management agreements and a full accounting procedure. Other provisions will also be required depending on the nature of, and constraints upon, the proposed Mining Project.

If a Development Proposal is not agreed unanimously, clause 3.3(b) permits compulsory acquisition of the interests of the non-Proceeding Joint Venturer in the ML Area by the Proceeding Joint Venturers at an agreed value or, failing agreement, at a market value determined by an Expert. Thus a recalcitrant minority Joint Venturer is not able to prevent a Development proceeding if there is a party willing to undertake it.

The Manager and the Management Committee

It is not uncommon for the manager of a joint venture to be appointed under a separate Management Agreement. This is particularly so for major Mining Projects and in those joint ventures where an affiliate of a Joint Venturer undertakes management responsibilities. In these circumstances considerable care needs to be taken with the interface between the JVA and the Management Agreement and the integration of the two agreements. In particular this requires careful cross-referencing of the operative provisions of each agreement, and their sequencing.

In the interests of simplicity and brevity, the Reference Group decided to include the manager and joint venture management provisions all in the same agreement. This eliminates the cross-referencing potential problems and also includes all the operative joint venture provisions in the same document for easy reference.

In the Model Exploration JVA, a nominated Joint Venturer acts as the Manager. The term Manager "means Party 1 or such other Manager as may be engaged from time to time under the terms of this agreement or appointed by the Management Committee under this agreement". This allows for a range of entities to be the

Manager. The Manager can be Party 1, normally being the Joint Venturer with the largest JV Interest, or an affiliated company of Party 1, or any other Joint Venturer, or a Farminee, or some other capable entity which may execute or accept appointment as Manager under the terms of the JVA.

Under the Model Exploration JVA, the Manager has wide powers, including the ability to delegate "the whole [but not part] of its rights, remedies, powers, discretions and obligations with the approval of the Management Committee." The discharge by the Manager of its duties is subject being provided with sufficient funds by the Joint Venturers to enable the Manager to perform those obligations. As is customary, the Manager prepares proposed Programs and Budgets for approval of the Management Committee and must carry out the work required to implement all Approved Programs and Budgets.

Funding for Approved Programs and Budgets is by way of the Joint Venturers paying the Manager pro rata monthly Called Sums, being an amount that the Manager estimates is necessary to finance Joint Venture Activities during the next month, or such other period as the Management Committee directs.

A matter of particular contention in Reference Group discussions was whether moneys invoiced to Joint Venturers to finance Joint Venture Activities should be defined as "*Called Sums*" or "*Cash Calls*". Our researches indicated that the term "Called Sums" had been in common use in mineral projects in Western Australia since at least the 1960s. In more recent times the term had been displaced in some instances by the term "Cash Call" which apparently has its origins in United States petroleum joint ventures. But "Called Sum" was still the majority term used. Use of the term "Cash Call" was more commonly used in the Eastern States, but "Called Sum" is still acceptable.

There was an even division of opinion in the Reference Group as to what term should be adopted in the Model JVA. After considering all the arguments for and against, I decided to adopt the term "Called Sum" for the purposes of the Model because that is, in my view, a more technically correct (and less colloquial) description of the process. Further the weight of exploration activity for minerals in Australia had to favour Western Australian practice. In any particular JVA, it probably does not matter which term is used, as long as it is used consistently. The choice can be made by the draftsperson, according to individual preference and practice.

In undertaking "Expenditure" on activities approved by the Management Committee, the Manager is not permitted, and has no authority, to operate substantially outside an Approved Program, or exceed an Approved Budget, except in case of an Emergency or, where there is a cost overrun which cannot be avoided by proper diligence, care and operating practice, but only to a maximum limit of 10%. The Management Committee must approve all other cost overruns.

The Manager is not liable to the Joint Venturers except for fraud or Gross Negligence or Wilful Misconduct (as defined) and any liability for consequential, economic or indirect losses (being liabilities often difficult to insure against) is limited to the amount recoverable by a party under any insurance policy. It was noted by some Reference Group members that this provision (in clause 5.8), although common, could be strongly resisted by some parties.

As to the Management Committee, at least one meeting per year is required and meetings may be held on 15 days notice in person, or by video meeting or by conference call at which all Joint Venturer representatives have the opportunity to be present. All persons participating in the video meeting or conference call must be able to hear (but not necessarily see) each of the others.

The nominated passmark for voting at Management Committee can be one of the most contentious issues to be resolved in negotiating a JVA. There is no standard formula to determining a passmark, so this is set out as a variable in Schedule 1, together with those matters for which unanimity is separately required.

Good Faith Obligation

There was considerable debate in the Reference Group whether there should an express "good faith obligation" clause included in the Model JVA. Is an obligation of good faith implied by law in any event?

The ambit of views in the Reference Group ranged from "No – this is inappropriate as it is a commercial agreement" to "Yes – a good faith obligation is now a standard inclusion in Joint Venture Agreements". A small majority of Reference Group members favoured inclusion of an express good faith clause, rather than saying nothing and leaving an obligation (if any) to be implied by law.

But there was no consensus on what the scope of a "good faith" clause should be. It was agreed that there should be a different standard required between Joint Venturers to that required from the Manager towards the Joint Venturers. This was especially important in the use of confidential exploration information.

It is also clear that the common law as to whether or not there is a principle of implied good faith in business contracts is not presently settled and is not likely to be settled until the issue is specifically addressed by the High Court of Australia.[2]

To resolve these divergences, the present draft Model requires the Manager (in clause 6.1(d)) to exercise "utmost good faith in all its dealings with each Joint Venturer". But as between the Joint Venturers, there is a lesser duty (in clause 3.5(e)) "to act co-operatively, honestly and reasonably in all its dealings with each other and the Manager concerning the Joint Venture".

[2] See *Overlook Management BV v Foxtel Management Pty Ltd* [2002] NSWSC 16, at para [62] per Barrett J, but see to the contrary *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL (Receivers and Managers Appointed) (Administrators Appointed) & Ors* (unreported, Victoria Court of Appeal, Warren CJ, Buchanan JA and Osborn AJA, 15 September 2005).

Dilution, Withdrawal, and Assignment

Although the Model JVA does not have a sole risk clause, a dilution provision is included, but it is placed in a schedule so it can be omitted or varied easily, if required, without affecting the rest of the document. Dilution (and sole risk) clauses are often long and complicated and vary widely, so to include both was to substantially lengthen the document, and to lessen its intelligibility.

Dilution and sole risk are often seen as two sides of the same coin, with dilution being a passive surrender of interest, while sole risk is an aggressive acquisition of interest. It was decided to include dilution, but exclude sole risk, because the view of the Reference Group was that dilution was reasonably common in exploration JVAs whereas sole risk was not. In any event, a Model sole risk clause will be included later as an Optional Clause. In the Model dilution clause, the main variable is the rate of dilution and that is a matter of negotiation and party preference.

The Model JVA allows a party to withdraw on 30 days notice, and there is a deemed mandatory withdrawal if the JV Interest of a Joint Venturer reduces by dilution, assignment or any other means to less than 5%.

There is the customary prohibition on assignment or other dealing with a JV Interest, except by unanimous agreement or as permitted by the JVA. The two permitted cases are:

1. An unfettered ability to assign the whole (but not part) of a JV Interest to Related Body Corporate
2. Where the assigning Joint Venturer has received, or wishes to make, a cash offer for *the whole or part of* its JV Interest "in whatever form and over any period (including immediate cash, deferred cash, royalty, net smelter return, net profit interest and the like, and including Expenditure on Exploration)" ie a farmin or farmout.

   In this case, a formal *"Notice of Offer"* procedure must be followed with acceptances within 45 days.

Other than in these cases, no assignment or other dealing is permitted, without unanimous agreement. In particular, *no assignment or other dealing, including a farmin or farmout, is permitted, without consent, for a non-cash consideration.* This provision was probably the greatest source of contention amongst the Reference Group in the development of the Model JVA.

In farmin or farmout situations, particularly with grass roots exploration and junior explorers, non-cash consideration is very common. In earlier drafts the Reference Group considered a novel permitted sale/assignment clause which allowed for a mixture of cash and non-cash consideration with a method of valuing the non-cash consideration for pre-emption purposes.

The difficulty with such a clause is that valuing non-cash consideration has many potential implications, including adverse consequences, inter alia, in relation to individual small company valuations, ASX Listing requirements and disclosure, especially for Non-Selling Joint Venturers.

As the draft Model is a basic Model Agreement, it was decided to omit a non-cash pre-emption clause in the draft Model, and to consider such a clause later as an Optional Clause, if desired. Proposals for, or examples of, a non-cash pre-emption clause from AMPLA members would be welcomed.[3]

Assignment and Assumption Deeds

Although the Model JVA does not have a Model Deed of Assignment and Assumption, this has been included in the Exposure Draft of the Model Farmout Agreements. As noted above, the Model Farmout Agreement has a single party version and a multi-party version. Although these Models have been prepared specifically for a farmout situation, ie an offer of Expenditure on Exploration in return for an assignment of a JV Interest, they can readily be adapted for the range of other possible cash considerations indicated in clause 11.3(b) of the Model JVA, being "immediate cash, deferred cash, royalty, net smelter return, net profit interest and the like".

Default and Compulsory Acquisition

It is important to note in the Model default clauses that there are two types of default which have different consequential provisions. Both material breach of the Model JVA, including insolvency (*Breach Default*), and failure to pay moneys due (*Unpaid Moneys Default*) are events of default in which the Manager or any non-defaulting Joint Venturer may (but is not obliged to) take enforcement action.

The difference in treatment is due to a Breach Default which may or may not be capable of being remedied and normally gives rise to a claim for unliquidated damages, while an Unpaid Moneys Default gives rise immediately to a claim for liquidated damages, which is more readily capable of being remedied and enforced.

Because of these differences, the cure period following notice for a Breach Default is 14 days while the cure period for an Unpaid Moneys Default is seven days. For a Breach Default there is provision for agreement on adequate monetary compensation, which provides a possible shortcut to avoid extended litigation to establish both the breach and the liquidated damages.

Interest on any moneys due under the Model JVA is payable at BBSY + 2%, to any non-defaulting Joint Venturer which has paid a Called Sum, or otherwise to the Joint Venture account.

3 For an excellent analysis of this topic, see J Kelly, "Rights to Acquire" [2006] *AMPLA Yearbook* 59 and see also S E N Creese, "Comment on Assignment Clauses in Mining and Petroleum Ventures" [1986] AMPLA Yearbook 149 at 155-160, H K McCann, "Pre-emptive Rights in Resource Joint Venture Agreements" [1990] AMPLA Yearbook 445; and Erin Feros, "Joint Venture Issues" [1998] AMPLA Yearbook 384.

If a default is unremedied, as required by the Model JVA, the consequence is *not termination* of the JVA, rather it is, in clause 13.1, *optional compulsory acquisition* (with a forced transfer) for value of the whole (but not part) of the Defaulting Joint Venturer's JV Interest. Termination of the JVA occurs only by agreement, or upon the parties ceasing to hold any interest in any Tenement, the subject of the JVA. Otherwise the JVA continues for the life of Tenements.

Forced Transfer on Default a Penalty?

The question of the value of a defaulted JV Interest, compulsorily acquired, was an issue which provoked much discussion and differing views in the Reference Group. Did the forced transfer in clauses 13.3 of a Defaulting Joint Venturer's JV Interest to Non-Defaulters which are obliged to remedy the default, but are not obliged to pay the Defaulter any further consideration, constitute a penalty and is therefore void?

Four members of the Reference Group did not consider the provision a penalty, four members of the Reference Group thought that if there was a dispute the provision could be litigated, while one member thought that the consideration for the forced transfer would be better being a royalty or a Net Smelter Return.

Income Tax Ruling 2378 was also cited as independent confirmation that the ATO accepted that wildcat or grass roots exploration acreage had little or no value, while proven or tested properties "had a significant net current value".

In the end the Reference Group chose the more conservative option. It was decided that the value to be provided in the Model JVA as consideration payable for a forced transfer should depend on the stage which the Exploration Joint Venture has reached, as follows:

- If a Feasibility Study is not being prepared, no cash is payable but the acquiring Joint Venturer must cure the Default Event (including paying outstanding Called Sums) and assume all future obligations and liabilities of the defaulted JV Interest
- If Feasibility Study is being prepared, the market value of the defaulted JV Interest is payable, less a discount of 10%, and less all unpaid amounts, including interest.

If the parties cannot agree on the market value of the defaulted JV Interest, the issue is referred to Expert determination under the Model JVA which must be determined within 30 days of appointment.

As an additional precaution, the parties acknowledge (in clause 13.4) that the consideration "does not constitute or give rise to a penalty, forfeiture or unjust enrichment", and that it "represents a reasonable and good faith assessment of the just and fair compensation for the Defaulting Joint Venturer in all the circumstances surrounding the Default Event".

The Rule against Perpetuities

During discussion of the various provisions in the Model JVA concerning the disposition of a JV Interest, whether voluntary or not, the issue arose whether the Rule against Perpetuities might apply to these provisions bearing in mind that the Model JVA has no fixed or determinate term and that dispositions may take place at an indeterminate time in the future.

At common law, the modern Rule against Perpetuities provides that an interest in real or personal property is void if it vests later than 21 years after the death of a life in being alive at the creation of the interest. The rule applies to contingent remainders and executory interests but not to vested interests.

Traditionally the Rule applied to interests in land and was thought to have little bearing on Joint Venture Agreements. But JV Interests under the Model JVA are interests in land and the Rule may apply potentially to the pre-emption, non-consent and dilution clauses in the Model JVA, and to other contingent property interests of indeterminate length, such as royalties as well as sole risk clauses.

The consensus of the Reference Group was that, while it was not likely that any Exploration JVA would last for 80 years, it is conceivable that a Mining JVA could.

All State and Territory jurisdictions in Australia, except South Australia, have retained the Rule but have modified it in different ways by statute, mostly providing for specification of a maximum perpetuity period of up to 80 years. But there are now different rules in different States. In Western Australia, New South Wales, Northern Territory and the Australian Capital Territory the maximum period is 80 years; in Victoria and Queensland, the maximum period is 21 years, and in Tasmania, the maximum period is six years. In South Australia, the Rule against Perpetuities has been abolished. Thus in Victoria, Queensland and especially Tasmania the Rule against Perpetuities is a potential issue for Exploration JVAs.

As a result of this issue being raised in the Reference Group deliberations, the topic will be addressed in more detail at the Conference in Session 5A on "Boiler Plate Clauses in Resource Contracts" on Friday 12 October 2007 at 9.00, two sessions before this one.

THE PREPARATION OF THE CONSEQUENTIAL MODEL AGREEMENTS

As set out above, following the completion of the Exposure Drafts of the Model JVAs, the AMPLA Board approved the preparation of further associated Exposure Draft Model Agreements ancillary to a JVA. These are:

- a Model Farmin Agreement;
- two Models Farmout Agreements, Multi-party and Single Party;

- two Model Deeds of Assignment and Assumption, Multi-party and Single Party;
- a Model Deed of Cross Charge; and
- a Model Permitted Chargee's Deed of Covenant.

Each of the further Model documents has been drafted so as to fit with each other. As can be expected, the definitions are consistent between them and, for example, the 2 party Farmin Model JVA may be used with any 2 party Farmin Agreement (with clause 2.1 deleted) and the Model Farmout Agreement is a farmout from the 3 party Model JVA.

Model Farmin Agreement Structure

The Model Farmin Agreement is a short form agreement of 14 pages. While it is drafted as an extension of the Model 2 party Farmin JVA, it can be used with any joint venture agreement, including the Model 3 party JVA. In addition, the parties during the farmin negotiations may wish to vary the provisions either of the Model JVA or the applicable joint venture agreement (if any). Provision for this to be done is made in Schedule 3.

As well as the normal JVA variables (Conditions Precedent, Minerals(s), Mining Act, Nominated State and Native Title Claims) there are a number of other variables set out in Schedule 1 relating to:

- Earning Obligations
- Earning Period
- Earned Interests
- Minimum Obligations, in work and cash
- Past Expenditure Amount to be refunded.

While its definitions and structure are linked to the Model 2 party Farmin JVA, the farmin parameters are different from 2 party Farmin JVA. In particular:

- there is provision for a buy in for cash as well as future work/expenditure;
- the Owner warranties are more extensive;
- the Acquirer must spend the Earning Expenditure to acquire the Earned Interest;
- the Acquirer must spend the Minimum Expenditure regardless;
- the Acquirer may withdraw before completion; and
- the Acquirer acquires the JV Interest only when earned, not upfront.

Model Farmout Agreement Structure – Single Party

The Model Farmout Agreement (Single Party) is essentially a funding agreement only extending to 16 pages. While it is drafted as a stand-alone extension of the Model 3 party JVA, it can be used with any joint venture agreement. As with the Model Farmin Agreement, the parties may vary the provisions either of the Model JVA or the applicable joint venture agreement (if any), in Schedule 3.

The Single Party Farmout Agreement assumes that only one of the Joint Venturers is farming out all or part of its JV Interest, and the Managership is unaffected. To earn or acquire its JV Interest, the Acquirer funds the Owner's costs during the Earning Period and (possibly) refunds past Expenditure. It is envisaged that the Single Party Farmout Agreement is used as the basis for a Notice of Offer for pre-emption purposes under the JVA and that the other Joint Venturers will consent to the proposed assignment or otherwise waive their pre-emption rights. If not, the Offer is either pre-empted or the farmout does not proceed.

There are similar variables to the Model Farmin Agreement and in addition:

- the definitions are linked to Model 3 party JVA or the existing JVA;
- only 1 Joint Venturer is farming out all or part of its JV Interests;
- the warranties and covenants are the same as Model Farmin Agreement;
- the buy in provisions are the same as Model Farmin Agreement;
- there is no replacement of the Manager;
- the work is done by the Manager at the cost of the Acquirer;
- there is permission for lodgment of a caveat;
- there is a new and extended GST clause; and
- a Model Deed of Assignment and Assumption, specifically drafted for the Single Party Farmout Agreement, is attached as Schedule 4.

Model Farmout Agreement Structure – Multi Party

The Model Farmout Agreement (Multi Party) is a more complex agreement than the Single Party Model. It extends to 18 pages. As with the Single Party Model, it is drafted as a stand-alone extension of the Model 3 party JVA and can be used with any joint venture agreement.

The Multi Party Farmout Agreement assumes that all the Joint Venturers are farming out an agreed pro rata part of their JV Interests. Owner 1, which is the Manager, is also transferring the Managership of the Joint Venture. To earn or acquire its JV Interest, the Acquirer is funding agreed costs during the Earning

Period, and (possibly) refunding past Expenditure. It also becomes the JV Manager. If the Farmout consideration is cash only, with no work component, a Sale Agreement is more appropriate to be used for the transaction.

The structure of the Multi Party Model is the similar to the Single Party Model, but:

- all the existing Joint Venturers are farming out all or part of their JV Interests;
- the existing Manager retires and a new Manager is appointed; and
- there are extensive management handover provisions.

Model Assignment and Assumption Deed Structure – Single Party and Multi Party

The Model Assignment and Assumption Deed is designed to give effect to its associated Farmout Agreement once the JV Interest being farmed out has been earned, it being included as Schedule 4 to the relevant Farmout Agreement.[4] There are only minor differences between the 2 Models' Deeds, reflecting the status of the parties. The Single Party Deed requires the Continuing Parties to waive their right of pre-emption and consent to the assignment, whereas in the Multi Party Deed all parties join in the assignment. As noted above, the Model Assignment and Assumption Deed can also be used with the Model Farmin Agreement, whether that is between two parties or more.

The common terms of each Model Assignment and Assumption Deed are:

- its definitions are linked to the Model Farmout Agreement and JVA;
- it has similar Conditions Precedents to the Farmout Agreement;
- the Conditions Precedents must be satisfied before it comes into effect;
- the Assignment is effective as at the date the Assigned Interests are registered;
- the Acquirer assumes all the JVA obligations;
- the parties confirm compliance with the JVA assignment permission process;
- the current good standing of the Joint Venture Agreement is confirmed;
- the Joint Venture Agreement is novated; and
- there are formal indemnities and releases.

An issue which was considered in detail by the Reference Group in relation to the Multi Party Model (but not the Single Party Model) was, while the Assignment was agreed to be effective when the Assigned Interests are registered under the *Mining Act*, whether the Acquirer should be deemed to have an equitable interest

[4] For an excellent review of the different types of structures for the assumption provisions of Assignment Deeds, see D A W Maloney, "Practice Note – Assumption Deeds" (2006) 2 ARELJ 219.

in the Tenements and in the Mining Information as from the Commencement Date of the Farmout for the purposes of carrying out its Earning Obligation under the *Mining Act.*

The argument for this was that the Acquirer needed to have an equitable interest in the Tenements to be able to comply with the provisions of the relevant *Mining Act*. This was an issue which arose only in respect of the Multi Party Model, not the Single Party Model, because the existing Manager undertook the work in the Single Party Model. After extensive debate, it was decided not to include this provision as it had potential adverse stamp duty, income tax and Capital Gains Tax consequences and it has not been customary in recent times to include these equitable relation back provisions.

Model Deed of Cross Charge and Model Permitted Chargee's Deed of Covenant

As noted above, the AMPLA Board has also asked the Reference Group to prepare Exposure Drafts of a Model Deed of Cross Charge and a Model Permitted Chargee's Deed of Covenant. Exposure Drafts of both these last Deeds are at an advanced stage of preparation, but have not yet been published.[5]

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[5] The AMPLA Model Agreements are the property of AMPLA Limited which owns the copyright.