JOINT VENTURE: NORTH AMERICAN EMIGRANT POSSESSING SKILLS NOT READILY AVAILABLE IN AUSTRALIA, FAMILY REUNION IMMIGRANT, OR NATIVE-BORN AUSTRALIAN UNRELATED TO FOREIGNERS OF THE SAME NAME?

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ABSTRACT: A comparison of joint ventures and partnership concludes that while a joint venture can be distinguished from partnership in the United States and Scotland this is not so in Australia where “joint venture” is merely a fancy pretentious alternative (and needless) variant of “partnership”.

KEYWORDS: partnership – joint venture – adventure – joint liability – several liability – joint enterprise – partners – participants – legal persons – corporation – company – natural person – profit – gain – product – produce – in kind – carrying on business – in common – view to profit – Australia – United States – Canada – Scotland – England – separate profit – joint profit – limited partnership – limited liability

I noticed that whoever was responsible for the publicity put the phrase *Joint Venture* in quotation marks. I think that is rather significant. There is a question, you know, as to what we're talking about, and whether this isn't a black cat in a very dark room, whether we'll be able to see it.

Berman, HJ, *Joint Ventures between United States and Soviet Economic Organisations*, Russian Research Center, Harvard University (1974) 1

In considering the possible legal status of the "joint venture" it is necessary to distinguish (and discount) the primary common substantive **venture** modified by the secondary adjective **joint** and confine ourselves only to the proper compound primary substantive **joint venture**.¹ There are many activities which could be classified as joint ventures and yet clearly do not possess the legal status of a joint venture that, it has been suggested,² are akin to Partnership. Rowley³ cites cases wherein persons have been held to be joint venturers or adventurers notwithstanding that the venture undertaken was purely domestic, social or pleasure-seeking in nature. That writer continues:

While the term "joint adventure", or "joint enterprise" or analogous terms, may be used to describe such non-commercial undertakings, the law governing the rights and duties of participants in such undertakings is not the law of joint adventure, as it has evolved as a branch of commercial law, but the law of international torts, of automobiles, or of negligence, as the case may be.⁴

Rowley further suggests that a "joint enterprise" is frequently distinguished from a "joint adventure" because of this feature of including non-commercial or non-business associations whose purpose may be social or pleasure-seeking.⁵ Thus, it is submitted, the term "joint enterprise" is an umbrella term of wide definition which covers the commercial partnerships and joint ventures (which are more narrowly defined) as well as non-commercial co-operative activities. It is proposed in this paper to reserve the term "joint venture" for business and commercial co-operative activities and use "joint enterprise" for the common substantive as modified by the adjective "joint".⁶

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It should further be noted that "venture" and "adventure" are considered as interchangeable synonyms with identical meanings.⁷ The term "adventure" will not be used in this paper except where accuracy of quotation requires its use.

As noted by Merralls⁸ there is no commonly accepted term to describe the parties to a joint venture and in this paper it is proposed to follow Merralls's example of calling such parties "participants"⁸ as a neutral term. The use of the term "partners" to describe such parties begs the question which this paper addresses itself to: namely, is there a difference between joint ventures and partnership in Australian law? "Partners" will be used to describe the parties to a partnership. For similar reasons the derivation of the expression "joint venture" will not be appealed to in support of any proposition that the liability of joint venture participants is joint and not several although it is noted that Pollock resorted to the derivation of the word "partnership" to support his proposition that a necessary element of partnership is the division or parting of the partnership profits.⁹ Merralls adverts to the academic controversy and concludes that the question is not pertinent to determining the legal character of a joint venture¹⁰ whereas Lindley is of the opinion that since the passing of the English *Partnership Act* 1890, a division of the profits is no longer a necessary element of partnership.¹¹

A final note on general semantics must record that the expression "joint venture" is sometimes used to describe co-operative undertakings between a foreign party and a domestic party where national and international policies dictate such co-operation, such policies being restrictions imposed on foreign ownership of domestic businesses and foreign assistance including the exporting of "know-how" to underdeveloped countries and the fostering of industrial growth in such countries.¹² Such joint ventures are not the result of freedom of contract or the disinclination of one of the parties to bear the whole risk and provide the finance for the undertaking.

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Indeed, such joint ventures usually have as one of the parties a foreign corporation well able to finance the undertaking and which would prefer to operate the business alone but nonetheless elects to take on a domestic co-participant for other reasons.¹³ It may be that such international undertakings are described as "joint ventures" because there is no definition of legal partnership common to both of the participants and their home nations. These joint ventures will not be further considered here except to note that writers on these joint ventures do not distinguish between joint ventures and partnership and indeed, use the words interchangeably.

I. PARTNERSHIP

The Australian Law of Partnership

It is proposed to consider Partnership initially as it is with this concept that a joint venture is usually compared with, distinguished from, or likened to the extent that some writers are of the opinion that they cannot be distinguished while others are not.¹⁴

The Australian legal system is in the main derived from that of the English and, in the case of Partnership Law, this is entirely so with the various Australian *Partnership Acts* being based on and following closely the English *Partnership Act* 1890. The Appendix provides a convenient cross-reference between the Victorian and the English Acts as well as comparable sections of the United States *Uniform Partnership Act*.

In the case of “joint ventures” this term would appear to have come to Australia from the United States where it was home-grown or else revived from almost moribund usage in the United Kingdom, particularly Scotland. The purpose of its invention or revival in the United States would appear to be the necessity for describing co-operative undertakings which were not partnerships.

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In Australia, partnership is defined as “the relation which subsists between persons carrying on a business in common with a view to profit”¹⁵ with business further defined as including “every trade, occupation, or profession”.¹⁶ The various elements of this definition will now be considered.

Persons

In Australia there is no restriction on the definition and capacity of persons, both natural and corporate, to enter into a partnership unless such persons suffer disabilities preventing them from entering into valid and enforceable contracts. Pursuant to the Victorian *Companies Code*¹⁷ a company possesses the capacity to enter into a partnership. The position is the same in the other Australian states and the United Kingdom.¹⁸ There is no controversy in Australia regarding the capacity

of a company to enter into a partnership and this point would not require consideration except for the fact that in another jurisdiction where joint ventures thrive, it is thought that a corporation cannot enter into a partnership.¹⁹ Similarly, a partnership or firm may be a partner in another partnership or firm.²⁰

Carrying on a Business

There is authority for the proposition that the “carrying on [of] a business” requires continuity and repetition²¹ with the consequence that a “once-off” transaction or a single venture cannot be the object of a partnership. Higgins and Fletcher²² cite the case of *Turnbull v Ah Muoy*²³ as such an authority. That case was not decided on the narrow ground of no “continuity of business”. Even had there been a series of repeated acts Ah Muoy would not have been held to be Turnbull’s partner pursuant to an agreement that A was to have a quarter interest in grain belonging to T and, as T’s agent, was to dispose of the remainder at a commission of 2¼%.

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Walsh²⁴ is in accord with Higgins and Fletcher although in seeking to distinguish a joint venture from a partnership he allows that a joint venture can involve the carrying on of a business.²⁵ In his discussion of the *Canny Gabriel* case²⁶ Walsh appears to ignore the limited nature of the object of the agreement²⁷ between Volume Sales and Fourth Media. Knox²⁸ allows that a partnership can exist notwithstanding that the parties carry on an undertaking which may be either a continuous business or a single operation such as prospecting a single mineral property.

Merralls²⁹ presents a more cogent argument that the limited scope of an activity may prevent a business coming into existence.

Of the opposite view is Lindley³⁰ who is of the opinion that notwithstanding an isolated transaction, the participants are partners. In the early cases wherein partnership was held not to exist, the limited nature of the transaction did not form the basis for the judgments. Although invited to do so by counsel for the appellant,³¹ the High Court of Australia did not appear to entertain the notion that the relationship between the parties in the *Canny Gabriel* case³² was that of a joint venture and held that the relationship was that of partners notwithstanding that the

participants described themselves as joint venturers and the object of their venture was the promotion of concerts by two entertainers. Harding³³ writes “[T]he fact that persons only associate to carry out a single venture with narrow compass ... clearly does not preclude partnership”. Later, the same writer considers the American literature which, seeking to distinguish joint ventures from partnerships, makes reference to the limited scope of the object of a joint venture. Harding concludes³⁴ that these features are consistent, in our law, with partnership.

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With respect, it is submitted that a venture of limited scope or a single transaction is within Australian partnership law as § 36(b)³⁵ expressly contemplates a once-off transaction:

Subject to any agreement between the partners, a partnership is dissolved, if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking.

Before leaving this discussion on “carrying on a business” it is desirable to refer to a specific semantic problem. Because some jurisdictions distinguish between partnerships and partnerships for limited scope (or “quasi-partnerships”) and sometimes adopt the expression “limited partnerships” to distinguish such limited ventures from the more recent creations of statute: the Limited Partnership³⁶ wherein the liability of partners is limited. It is suggested that Rowley³⁷ may be followed and the term “special partnership” be used when describing a partnership limited in scope leaving “limited partnership” a sole role in describing limited liability partnerships.

With a view to profit

It is beyond dispute that a partnership which does not show profit can nonetheless still be a partnership: the essential element being that the partners envisage profit. What is not clear is what constitutes “profit”.

Rowley notes³⁸ that profit need not be measured or measurable in the accountants’ conventional terms of excess of income over disbursements and proper charges, but the fundamental purpose and object of the enterprise must be commercial.

The word “profits” implies a comparison between the states of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can

only be ascertained by a comparison of the assets of the business at the two dates ...

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We start therefore with the fundamental definition of profits, namely, if the total assets of the business at the two dates be compared, the increase which they shew at the later date as compared with the earlier date ... represents in strictness the profits of the business during the period in question.

per Fletcher Moulton LJ, *Re Spanish Prospecting Co Ltd* [1911] 1 Ch 92 at 98 and 99 (CA).

*Jowitt's Dictionary*³⁹ gives, *inter alia*, the following under the heading **Profit**:

advantage, or gain in money or money's worth In the law of real property "profit" is used in a special sense to denote a produce or part of the soil of the land, Profits lying in reversion consist of rents due, and services rendered to a lord by his tenant.

Walsh⁴⁰, seeking to distinguish a partnership from a joint venture, suggests that a partnership carries on business with a view to the mutual gain of the partners.

It is submitted that it is not necessary that the term "profit" in § 5(1)⁴¹ is the same term as "profits" in § 6⁴² and that the distinction drawn by the legislators in drafting the 1890 Act was to distinguish between the singular "profit" and the plural "profits".* Certainly the distinction cannot be said to be based only on euphonics as the sections read equally well when the singular and the plural are transposed. The *Oxford English Dictionary* entry for **profit** notes the following uses:⁴³

1. The advantage or benefit (of a person, community, or thing); use, interest; the gain, good, well-being. Formerly sometimes pl. when referring to several persons.
2. ...
3. ...
4. That which is derived from or produced by some source of revenue, eg ownership of land, feudal or ecclesiastical rights or perquisites, taxes, etc; revenue, proceeds, returns. Chiefly pl.
5. The pecuniary gain in any transactions; the amount by which value acquired exceeds value expended; the excess of returns over the outlay of capital; in commercial use chiefly pl.

* See *In re Arthur Average* (1875) LR Ch App 542 where the distinction between "gains" and "gain" is considered (Sir George Jessel MR). [added annotation 2009]

[page 8] while Skeat's⁴⁴ entry for the same word gives "to make progress, advance."

Thus it is submitted that one can engage in a commercial business for profit where the profit is not monetary but a financial advantage or gain in money's worth. The example of two merchants who co-operate in the transportation of their goods for sale thereby effecting a saving in transportation costs is suggested wherein the two merchants are not partners in the business of merchandising but are partners in the business of transportation. Rowley's historical introduction to the subject of partnership⁴⁵ countenances profit besides pecuniary gain.*

It is recognised that the cases do not support the above proposition and the word "profits" has usually been taken to mean pecuniary profits. The question of whether there is a distinction between the singular and plural forms of the word has apparently not come before the courts.

Lindley,⁴⁶ without citing authority, states "[i]t is essential that what is to be shared is the profits of the business ...". Later, the same author,⁴⁷ after considering Pollock's inferred requirement for the existence of a partnership that a division of profits is essential,⁴⁸ concludes that a division of profits is not essential:

It is apprehended that even before the Act of 1890 persons who carried on a business in all other respects as partners, but with the object of applying the profits towards some charitable purpose, instead of dividing them among themselves, would have been partners.⁴⁹

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Drake⁵⁰ considered this question and concluded that § 46⁵¹ retained the common law as it existed prior to 1890. Drake also considered the position of partners who, instead of dividing the profits among themselves, allocate the profit to some third person or charitable or philanthropic institution. He concluded that the partners were disposing of a right to share in the profits and that by their forgoing of a share

* See *In re Riverton Sheep Dip* [1943] SASR 344 where Mayo CJ held that the co-owners of a sheep dip numbering more than 20 was an illegal partnership in that it carried on a business for the individual gain of its members; their gain being cheaper fees and preferential use of the dip over non-members. See also (February 1984) *Law Institute Journal* (Vic) for "Joint Partnerships". [added annotation 2009]

of the profits it does not follow that they have no right to the profits. Miller is of the opinion that a division of the profits is not necessary and that recourse to § 46 cannot resurrect the pre-1890 position because § 46 only has operation where it is not inconsistent with the express provisions of the Act.⁵²

It is submitted that the sharing of the profits and their division is not essential to the establishment of a partnership. A distinction is to be seen between the § 5(1) definition of partnership and the § 6 Rules for determining the existence of a partnership wherein the sharing/dividing is not a necessary element of the definition while the sharing of profits does have the effect of providing *prima facie* evidence of a partnership. Certainly a partnership which elects to retain the profits in the business would not be held to not be a partnership because the partners did not share and divide the profits.

Harding⁵³ suggests there are six elements of partnership wherein his third, fourth, and sixth have already been discussed above. Harding's first element requires that there be a relation founded on contract, express or implied, between partners. The second requires that relationship must be in existence such that dealings prior to the formation of a partnership are not covered by partnership law.⁵⁴ Harding's fifth element requires that the partnership business must be carried on by the partners "in common", this requirement being that the partners conduct the business jointly for the common benefit of all the partners. This requirement does not mean that all partners must participate in the control and management [page 10] or day-to-day running of the partnership business – it is sufficient that they are entitled to participate.⁵⁵

The above is sufficient to define partnership but it remains to consider requirements that other writers consider essential:

Knox⁵⁶ suggests that an essential requirement of partnership is the joint receipt of income. There is no requirement within the Act nor derived from common law that this is the case although § 6(2) provides⁵⁷ that the sharing of gross returns does not of itself create a partnership. That is not to say, of course, that a partnership can exist without the sharing of gross returns. § 15(a) provides⁵⁸ for the case where one partner acting within the scope of his apparent authority receives the money or

property of a third person and misapplies it, the consequence being that the firm is liable to make good the loss. While that instance clearly does not involve joint receipt of money or property it can be considered as a “constructive” joint receipt.⁵⁹ The *Income Tax Assessment Act* defines partnership as “an association of persons carrying on business as partners or in receipt of income jointly.” This definition has the effect of bringing into partnership, for tax purposes only, besides those who are partners according to partnership law, those persons in receipt of joint income with the consequence that persons who are not ordinarily partners (such as co-owners of income producing property) will be treated as partners for tax purposes. Again, it is not a necessary consequence of the taxing statute that a partnership can exist without the receipt of joint income. As noted previously, it is not essential that a partnership be profitable, only that business be carried on with a view to its being profitable. Thus it is possible to construct an example of a partnership which is so unprofitable that there is not even income derived. Yet, so long as the unprofitable partnership business is carried on with a view to profit it would still be a partnership. It is submitted that Knox has superadded this requirement [page 11] of a joint receipt of income in anticipation of his defining of a joint venture such as found in the Australian mining industry wherein⁶⁰ he describes the most important feature of such a joint venture as that it is *carried out not for joint profit, but for the purpose of individual gain* with the clear implication being that a partnership business is carried out for joint profit. Walsh’s definition of partnership is similar to that of Knox when he commences with the statutory definition of partnership⁶¹ and several pages later that definition has been subtly altered to “the carrying on in common with a view to common profit”.⁶² This is no more than semantic sleight of tongue by Walsh. Further, to distinguish partnership from his definition of an Australian joint venture, Walsh states that a partnership carries on the business with a view to the mutual gain of the partners.⁶³

English Partnership Law

The Act of 1890 is equivalent to the Australian *Partnership Acts* except that there are no Australian equivalents to section 1(2)(a) which exempts mining companies subject to the jurisdiction of the Stannaries from the operation of the Partnership Act and section 4(2) which states that in Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged

on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro rata* from the firm and its other members. Similarly sections 9 and 47 which are peculiar to Scotland have no equivalent in the Australian legislation.

It is important to note that the section 32(b) of the English legislation is in identical terms to section 36(b) of the Victorian *Partnership Act* which has already been discussed.⁶⁴

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Pollock⁶⁵ is of the opinion that the incidents of the Scottish joint venture which is confined to a particular adventure cannot be distinguished from those of partnership. Thus it would appear that the expression “joint venture” in English law is that of a substantive modified by the adjective and equivalent to the previously described joint enterprise.⁶⁶ Hence it is concluded that English partnership law has already been fully discussed above in reference to Australian partnership law.

Given that the Australian law is founded on that of England this conclusion is not at all remarkable.

Scottish Partnership Law

The Scottish law of partnership has, since 1890, been identical with that of England except for those express provisions in the English Act relating to the *persona* of the Scottish firm,⁶⁷ the joint and several liability of the partners for contractual debts and obligations⁶⁸ and the law of bankruptcy in Scotland.⁶⁹ Thus it would seem that while the liability of partners in an English firm is primary and secondary in the case of partners in a Scottish firm, Burgess and Morse⁷⁰ are of the opinion that the ultimate result in either jurisdiction will usually be the same.

As previously noted, § 32(b) by necessary implication does not remove a single adventure or undertaking from Partnership Law and thus, at least since 1890, the law relating to Partnership in Scotland is essentially the same as previously described in relation to Australia except for those statutory provisions peculiar to Scotland already noted.

American Law

In the United States the *Uniform Partnership Act* which is in terms similar to the 1890 English Act defines a partnership as “an association of two or more persons to carry on as co-owners a business for profit”.⁷¹ Section [page 13] 2 of that Act further defines “business” to include every trade, occupation, or profession⁷² and “persons” to include individuals, partnerships, corporations, and other associations. The US Act has a similar provision to § 32 of the English Act of 1890 wherein a partnership dissolution is caused by the termination of the particular undertaking specified in the agreement.⁷³ Another section of the US Act also necessarily implies that a single adventure or undertaking can nonetheless still be a partnership when that section makes provision for the continuation of a partnership formed for a particular undertaking when business is continued beyond such particular undertaking.⁷⁴

Rowley in his chapter on the definition of a partnership⁷⁵ implies that a partnership usually relates to more than a single transaction although a later section of the same chapter expressly states and provides case citations as authority that partnerships can be organised for one particular transaction or venture.⁷⁶

It would seem that in some jurisdictions of the United States it is believed that a corporation cannot be a partner in a partnership.⁷⁷ The rationale for this belief is not founded on partnership law but on corporation law as the *Uniform Partnership Act* expressly provides that a person includes a corporation. However, a corporation is a creature of statute and its powers are conferred by statute. It is a violation of law for a corporation to enter into a partnership unless expressly empowered to do so by statute⁷⁸ and even the statutory power for a corporation to enter into contracts relating to the conduct of its business is sufficient to empower a corporation to enter into a partnership. Further, a corporation can only act through its officers and agents and were a corporation to be a partner, that corporation would be bound by the acts of its partners. It is, of course, arguable that such a corporation which is bound by the acts of its partners is acting through its agent as every partner is an agent of the partnership.⁷⁹

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Rowley concludes by stating the net result to be that corporations have, in a considerable number of cases, been held to be empowered to enter into joint ventures for transactions which are within their private powers, even though there might be a question as to the power to enter into a partnership. Thus, he continues, the practice seems largely destructive of the theory of *ultra vires* when only lip service is paid to that doctrine.⁸⁰ It is in fact a “subterfuge”.⁸¹

With regard to the carrying on of a business the law in the United States appears to be similar to that of Australia and the United Kingdom wherein although the usual partnership requires more than the carrying out of a single transaction, there can nevertheless be a partnership for the consummation of a single transaction, adventure, or undertaking.⁸² That a transaction or adventure of limited scope can still be a partnership is further recognised by the existence in the United States of three kinds of partnership; viz universal, general, and special.⁸³ A universal partnership is brought about when the partners pool all their property, time, and effort in a common ownership. Because of their comparative rarity such a partnership will not be further considered. A general partnership is the most common kind of partnership which is entered into for everyday structuring of a business.

The existence of a special partnership as a kind of partnership lends support for the proposition that a partnership can exist despite the limited scope of the business transaction or undertaking⁸⁴ as does the existence in the statute of provisions specifically designed for such special transactions.⁸⁵

The requirement that the partners carry on their business for profit⁸⁶ is similar to the definition found in both the Australian and English statutes. The previously noted distinction between the singular and plural forms of the word “profit” is also to be found in the American *Uniform Partnership Act* where § 7 of the Act refers [page 15] to “profits” when setting out the rules for determining the existence of a partnership. Further, Rowley when discussing this requirement notes that the purpose of a partnership association must be for gain⁸⁷ and cases are cited wherein a proprietary interest or property in or control over the undivided profits is

sufficient to satisfy those rules.⁸⁸ Thus it would seem that a division or sharing of the profits is not an essential element of American partnership law.

A further commercial co-operative found in American law and peculiar to America is the Mining Partnership⁸⁹ which is a “partnership” formed between co-owners of mines or minerals in place for the development or working of those mines.⁹⁰ It is recognised that a corporation can be a member of a mining partnership⁹¹ and the principle of *delectus personae* is absent from a mining partnership. This principle is found in § 24(7) of the English Act⁹² wherein no person may be introduced as a partner without the consent of all existing partners. The application of the principle is however subject to § 19 wherein the mutual rights and duties of partners is defined by the Act may be varied by the consent of all the partners. Thus the principle is not an essential term of a partnership but can be excluded by agreement between the partners. The equivalent section in the *Uniform Partnership Act* permits agreement between the partners to vary the mutual rights and duties of the partners.⁹³

Canadian Partnership Law

It would appear that Canadian partnership law closely follows that of America which is not surprising given the close geographic proximity of the two countries. It is noted that §§ 16 and 24 of the *Corporations Act* 1970 and § 15 of the *Business Corporations Act* 1974-75 expressly empower corporations to enter into partnerships. Although Canadian courts have recognised the existence of a distinctive legal relationship apart from partnership in that it is related to a limited object,⁹⁴ it is submitted [page 16] that Canadian partnership law is identical to that of England and Australia. The Privy Council felt it to be immaterial whether relationship before it was called a partnership or a joint venture and concluded that “it probably was a partnership” in the case of *Ross v Canadian Bank of Commerce*.⁹⁵

Partnership Summary

It appears that the Australian, English, and Scottish law, at least since 1890, share the same definition of partnership while in the United States there is opinion, although equivocal, that requires a continuing and ongoing business. The position

in Canada seems to lie somewhere between these views although a joint commercial enterprise has achieved recognition as something not a partnership although akin to a partnership.

II. JOINT VENTURES

Shershaw [the Deputy director of the Institute of US Studies] said he had no objection to the term “joint venture”, although he said, it may have different meanings to different people.

Berman HJ, *Joint Ventures between United States and Soviet Economic Organizations*, Russian Research Center, Harvard University (1974) 2.

In English law the expression “joint venture” can be found although it is doubtful that it has any meaning beyond the common substantive modified by the adjective.⁹⁶ Lindley’s only reference to the expression is in relation to insurance underwriters assuming a fractional proportion of an insurance liability under the terms of a single policy⁹⁷ and he stresses that “much may depend upon the precise terms in which the policy is framed”.⁹⁸ If such a policy provided the insured’s risk was to be covered severally by a number of underwriters it is difficult to infer a joint liability of the underwriters towards the insured where there was no agreement, express or implied, between the underwriters to conduct each other’s business [page 17] by way of mutual agency. The illustration provided by Lindley is analogous to the vendor of a large parcel of company stock who effects a sale to a broker who in turn is acting as the buying agent for a number of investors who wish to acquire a smaller number of shares than the parcel being offered. Thus each of the underwriters can be seen to be assuming a fractional and severable proportion of the liability. Halsbury⁹⁹ refers fleetingly to the term when describing transactions which do not result in partnership:

If two persons jointly export their individual goods for sale as a joint adventure, dividing the profits of the transaction in specified shares, there is no partnership as regards the separate parcel of goods provided by each, until they are brought into common stock. Conversely if they are jointly concerned in the purchase, they are not partners unless they are also jointly concerned in the future sale. Where, however, they agree to embark in a joint adventure for the purchase and sale of goods, there is a partnership as regards all the goods bought in pursuance of the agreement,

It is clear from the last sentence that Halsbury is using the term as a common substantive modified by the adjective as that sentence permits a partnership to be a joint venture. Further it is submitted that Halsbury is misleading if he means that persons who are jointly concerned in the purchase and are also jointly concerned in the future sale are partners. It is only true that such persons may well be partners but it does not follow that they will be in every such case: an example being co-owners of a property or properties who were jointly concerned in the purchase and who may well be jointly concerned in a future sale are not necessarily partners.¹⁰⁰

Pollock¹⁰¹ considered the Scottish joint venture defined thus:

Joint adventure or joint trade is a limited partnership, confined to a particular adventure, speculation, course of trade, or voyage; and in which the partners, either latent or known, use no firm or social name, and incur no responsibility beyond the limits of the adventure[.]¹⁰²

and concluded that he could not distinguish these incidents of a joint venture from those of partnership.

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The treatment by Burgess and Moore¹⁰³ of the Scottish joint venture which has a similar definition to that given above would mean that whereas the liability of partners in an English firm is primary and that of partners in a Scottish firm secondary¹⁰⁴ because of the separate *persona* of the Scottish partnership, the liability of participants in a Scottish joint venture is primary because such a joint venture has no separate *persona* distinct from that of its participants. Those authors concluded that a joint venture was a species of partnership.

It is thus submitted that in the English context the term has two meanings, first as the modified common substantive which was previously proposed to be called a joint enterprise in this paper,¹⁰⁵ and secondly, as a term to describe a species of partnership or something akin to a partnership which is recognised in Scotland as being distinct from a partnership although the distinction is not recognised in England.

The Scottish “joint venture”

Miller devotes a chapter to joint ventures¹⁰⁶ noting that, although distinguished traditionally in Scots law from a partnership or firm, it is clearly a species of partnership¹⁰⁷ because it remains in essence “the relation which subsists between persons carrying on a business in common with a view of profit”.¹⁰⁸ Miller also notes that the legal consequences do not entail any divergence in legal theory from that which governs partnership¹⁰⁹ and that the joint venture is accorded recognition by § 32(b) of the 1890 Act.¹¹⁰

After giving consideration to the opposing views regarding the separate *persona* of the Scottish joint venture, Miller concludes that the joint venture does possess an independent *persona* equally with any other form of Scottish partnership.¹¹¹

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It is suggested by Miller that a joint venture participant has a limited authority conferred upon him by his co-participants in that he can only transact the joint venture business.¹¹² Even if this were true, such limited authority is no less than the authority of a partner who is empowered to bind the firm for the purpose of the business of the partnership.¹¹³ Thus this cannot be the basis of any distinction between the two concepts.

Moreover Miller, after discussing the principle of *delectus personae*, is unable to draw any distinction between partnership and joint ventures.¹¹⁴

Thus is submitted that there is no distinction to be drawn between partnership and joint ventures, certainly since the passing of the 1890 Act though with regard to the pre-statute law of Scotland, Miller provides authority for the proposition that prior to the 1890 Act no distinction could be drawn.¹¹⁵

The “joint venture” in America

From the above discussion of partnership and joint ventures it seems clear that the term “joint venture” was adopted in America to describe those relationships which were or are thought to be outside the definition of partnership. Thus the essential distinguishing features of a joint venture are that they are open to corporations to participate as joint venturers when they cannot participate as partners in a

partnership and that, as in Scotland, a joint venture is for an *ad hoc* transaction or the scope of the joint venture business is limited as compared with the continuing nature of a partnership business.

Thus, participants in a joint venture are mutual special agents wherein a special agent is one authorised to conduct a single transaction or a series of transactions not involving continuity of service.¹¹⁶ Partners in a partnership are mutual general agents – a general agent [page 20] being one authorised to conduct a series of transactions involving continuity of service.¹¹⁷ From this it follows that the previously described Mining partnership¹¹⁸ which does not involve general mutual agency or the principle of *delectus personae*¹¹⁹ is of course a joint venture¹²⁰ although joint ventures are not limited to Mining partnerships.¹²¹

The distinction between the American joint venture and partnership has been variously described as “difficult”¹²² and clear because the distinction can be and has often been stated in terms which are no more ambiguous than those distinguishing most other legal relationships which are similar enough to require special distinction.¹²³

While the distinction between the two vehicles may be difficult to discern it is clear that they both share many similarities. Both partners and joint venturers enjoy the right, whether exercised or not to participate in the control and management of the business or transaction.¹²⁴ Both are governed by similar rules of law¹²⁵ and the joint adventurer, like the partner, “has the dual status of principal for himself and agent for his associates”.¹²⁶ Similarly, the remedies available to the participants are the same for partnership and joint ventures¹²⁷ and both are treated alike for Federal US income tax purposes.¹²⁸ Participants have unlimited liability and similar fiduciary duties in both vehicles.¹²⁹

It is submitted that, in American usage, a joint venture can be distinguished from a partnership for two reasons: that a corporation can participate in a joint venture but not always in a partnership and the scope of the business of a joint venture is limited compared to the continuing business of a partnership. Notwithstanding these distinctions, both vehicles are subject to the same laws.

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Canadian “joint ventures”

From the above discussion of American joint ventures and the previous consideration of Canadian partnership¹³⁰ it is clear that, if the joint venture is recognised in Canada as a relationship distinct from partnership, the only distinction can be the limited scope of the joint venture compared to the partnership. Joint ventures have been accorded judicial recognition in Canada¹³¹ with reliance placed on American authorities and texts and the following definition is offered:

In summary, then, a working definition of joint venture based on the actual judicial decision may be thus formulated: A joint venture is an association of persons, natural or corporate, who agree by contract to engage in some common, usually *ad hoc* undertaking for joint profit by combining their respective resources, without however, forming a partnership in the legal sense (of creating that status) or corporation; their agreement also provides for a community of interest among the joint venturers each of whom is both principal and agent as to the others within the scope of the venture over which each venturer exercises some degree of control.¹³²

It is submitted that the legal consequences that the legal consequences of a Canadian joint venture and partnership are the same.

Transplanting the “joint venture” to Australia

After considering American joint venture law (or lore) and the discussion of Australian and English partnership law it is clear that the necessity for joint ventures found in America does not exist in Australia where companies are empowered to enter into partnerships and the law of partnership does not distinguish between the limited scope of a single transaction and the continuing business of a partnership. Thus it could be concluded that an Australian definition of partnership is broader than its American counterpart: the field covered by the Australian definition is the sum of the two areas covered by the American definitions of partnership and joint venture respectively. And it is there that the matter would remain but for a strong body of opinion that joint ventures and partnership can be and are distinguished in Australia.

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A possible “Australian joint venture” distinct from any other

Higgins and Fletcher¹³³ cite Australian High Court authority¹³⁴ that a joint venture constituted a partnership. This is incorrect as, in that case,¹³⁴ the High Court held

that the relationship between the participants was that of partners notwithstanding that the participants had described themselves as being parties to a joint venture.

There is a body of opinion in Australia¹³⁵ to the effect that a joint venture differs from partnership because in a joint venture, unlike a partnership, there is no joint profit derived by the participants – the participants take the product or produce in kind and, by severally selling, derive several profits. That this distinguishing feature of a joint venture is not recognised in the United States would appear to necessitate distinguishing such a joint venture from an American joint venture. Merralls¹³⁶ and Harding¹³⁷ expressly do so distinguish such a joint venture from the American version while Ryan,¹³⁸ Leslie,¹³⁹ Knox,¹⁴⁰ and Chate¹⁴¹ impliedly do so by confining this joint venture to that found in the Australian mining industry; Leslie expressly ignoring other types of associations commonly referred to as “joint ventures”.¹³⁹ Only Walsh¹⁴² suggests that such a joint venture can operate outside the Australian mining industry.

It is readily apparent why the mining industry (including petroleum production) lends itself to this peculiarly Australian concept of the participants taking their share of the product in kind and thereafter disposing of it or dealing with it as each individual participant wishes. Such an industry lends itself to the idea of the participants receiving the fruits of the venture separately and in kind. Yet, such a concept of a joint venture need not be confined to the mining industry. Donald and Heydon¹⁴³ note that all light bulbs for the [page 23] Australian market are jointly produced in a single factory in South Australia but separately marketed although the business structure of the joint production facility is not disclosed by the authors.

It is submitted that Walsh, while allowing that a joint venture wherein the participants take separately and in kind is not confined to the mining industry, impliedly restricts such a joint venture to Australia by noting that in the United States no serious attempt is very often made to distinguish between joint venture and partnership.¹⁴⁴

Although as late as 1980 it was written that:

Australian writers seem to have accepted without question that there is a distinction [between joint ventures and partnership], but they (like our judges) have, to my knowledge, not analysed the distinction or fully supported the view by authority (see eg MG Chate, “The Law of Mining in Australia” and JG Tuckfield, “Corporate Financing of Mineral Ventures”, both in *University of Sydney, Committee for Post Graduate studies in the Department of Law* (1969); and MJ Walsh, “Partnerships – Joint Ventures and Taxation”, *Taxation in Australia XII* (December 1978/January 1979) 478)¹⁴⁵

it is noted that Harding¹⁴⁶ in 1976 and Merralls¹⁴⁷ in 1980 and Ryan¹⁴⁸ in 1982 all provided comprehensive analysis and authority for this peculiarly Australian distinction between joint ventures and partnership. The description of the distinction as “peculiarly Australian” reflects the fact that the distinction does not appear to have been recognised outside Australia although the distinction, albeit unrecognised, may still be valid outside Australia.

The distinction is based upon the fact that in a partnership, the partners are in joint receipt of the business income.¹⁴⁹ It is submitted that this distinction is based upon a definition of partnership which definition’s legitimacy is doubted by this writer.

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In support of the distinction Walsh introduces the requirement that partners are engaged in business in common with a view to common profit¹⁵⁰ or alternatively for the mutual gain of the partners.¹⁵¹ Knox requires that the business of the partnership be carried out in common for joint profit.¹⁵² Both writers contrast these partnership requirements with the purpose of individual gain that provides the distinguishing feature of a joint venture.¹⁵³ The definition of partnership provided by both Walsh and Knox does not accord with the statutory definition.¹⁵⁴ Further, Walsh’s definition of a joint venture lacks authority beyond the fact that it is described as “a common definition given to a joint venture”¹⁵⁵ while Knox cites as authority for his definition a 1980 paper delivered by RK Moore and an unsourced paper by WD Leslie.¹⁵⁶ Chate¹⁵⁷ does not purport to provide authority but does note that the joint venture has its origins in the requirements of US tax law which is the view of Harding who does provide authority.¹⁵⁸

Of two cases that have been litigated in Australian courts concerning joint ventures as a business vehicle, the first, the *Canny Gabriel* case¹⁵⁹ was held to be a

partnership notwithstanding that the participants had chosen to describe themselves as participating in a joint venture. Although the High Court affirmed Mahoney J's order on appeal,¹⁶⁰ the court neglected to consider the distinction, if any, between a joint venture and a partnership although Mahoney J had held that the relationship was a joint venture¹⁶¹ and the appellant, before the High court, had argued that the relationship was that of a joint venture and that different consequences flowed than would were it a partnership.¹⁶² Because the High Court did not address itself to the question of a distinction between joint ventures and partnerships it is submitted that this decision of the Court does not assist much in attempting to discern the distinction between the two business vehicles. The second case, decided by the New South Wales Court of Appeal¹⁶³ is currently the subject of an appeal to the Privy Council.^{164*}

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In *Brian PL v UDC Ltd*¹⁶⁵ the two parties and a third (SPL) were participants in what the three parties described as a joint venture with SPL being the manager for the business vehicle. In the negotiating or pre-agreement stage, SPL granted to UDC a mortgage charged on the assets of the proposed business vehicle, the mortgage being founded on obligations SPL owed to UDC in respect of other ventures besides the one under consideration. Brian was unaware of the mortgage. The Court of Appeal¹⁶⁶ held that the participants were joint venturers and that such joint venturers have fiduciary obligations with Hutley and Samuels JJA holding that intending joint venturers were subject to the same fiduciary obligations as were joint venturers and that these obligations were analogous to those of partners¹⁶⁷ or were the same as those of partners.¹⁶⁸ In seeking to determine the exact nature of a joint venture the court resorted to North American and Scottish authorities¹⁶⁹ wherein it was found that the distinguishing feature of a joint venture was its limited scope.¹⁷⁰ The possibility of the joint venturers taking the fruits of the venture separately and in kind was not canvassed by the Court nor, it would seem, was it argued. Because the proposed venture was a major commercial property development it is difficult, though not impossible, to imagine how the participants

* The appeal (ultimately determined by the High Court of Australia, dismissing the appeal) does not support the proposition that a joint venture can be distinguished from a partnership; see *UDC Ltd v Brian PL*, (1985) 157 CLR 1, *Australian Law News* (September 1985) [added annotation].

could have taken the fruits separately and in kind. It is interesting to note that the participants described themselves at varying times as joint venture shareholders,¹⁷¹ partners,¹⁷² equity partners,¹⁷³ and joint venture partners.¹⁷⁴ Although it is not decisive on the point it is also interesting to note that the recent press release announcing the Federal Government's *ex gratia* compensation payment to the two companies refused export permits for the Fraser Island mineral sands described the two companies as a joint venture.¹⁷⁵ When the issue was before the High Court¹⁷⁶ there was no suggestion that the two participants wished to severally and independently export the fruits of their mining business,¹⁷⁷ Mason J describing the plaintiffs as "companies which carry on [page 26] in partnership on Fraser Island ... the business of mining for mineral sands from which they produce zircon and rutile concentrates. ... Their intention is to export zircon and rutile concentrates to be produced from the minerals extracted".¹⁷⁸

The foundation of the distinctive Australian joint venture

It is recognised by Harding that, of those English and Australian cases in which a joint venture has not been held to be a partnership, the facts have clearly supported a view that the parties have not carried on a business in common and have not apparently been doing so.¹⁷⁹ Miller's discussion¹⁸⁰ of *Hoare v Dawes*¹⁸¹ holds that there was no element of partnership or joint adventure in the arrangement under consideration

These cases form the basis on which Ryan formulates his proposition that these cases lend support to the view taken by a number of Australian commentators that under a typical mining or petroleum joint venture agreement there is no partnership because the business is not carried on with a view of joint profit; each joint venturer instead taking its share of the production and dealing with it separately.¹⁸² Later Ryan cites another two cases which he suggests might be regarded as further support for the views expressed by Australian commentators.¹⁸³ It is these cases which are also cited in Halsbury¹⁸⁴ which is appealed to by Leslie.¹⁸⁵

Thus it falls to now consider those cases:

Hoare and others v Dawes and another¹⁸⁶

In this case a number of defendants, unknown to each other contracted with a broker who was the ostensible purchaser of a quantity of tea as there was no one buyer or dealer able to cope with such large lots. It was only after the ostensible purchaser went bankrupt and informed the plaintiffs of the identities of his principals that [page 27] the plaintiffs brought suit against the defendants that they were partners amongst themselves or in partnership with the broker. It was held that the defendants were not partners amongst themselves nor were they in partnership with the broker. It does not appear from the report why the plaintiffs did not sue the defendants individually as undisclosed principals but had they done so, the legal obligations of the defendants would have been several towards the plaintiffs. The rationale behind the court's decision being that each of the defendants had an undertaking with the broker for a particular quantity,¹⁸⁷ that there was no common arrangement for the disposal of the tea¹⁸⁸ and that the defendants had never met or contracted together as partners.¹⁸⁹

Coope v Eyre¹⁹⁰

A, B, C, and D entered into an agreement to purchase goods in the name of A only and to take aliquot shares of the purchase without any agreement to jointly resell the goods. On the failure of the ostensible buyer; B, C, and D were held not answerable to the seller as partners with A. It is conceded that this case does lend some support to Ryan's proposition although it can be confined to its facts of a joint purchase only.

Gibson and another v Lupton and Wood¹⁹¹

Lupton and Wood concurred in giving a purchase order to the Plaintiffs' agent for one undivided parcel of grain. It was held that the defendants were not liable as partners because

... payment for the same [was] to be drawn upon each of the Defendants, which imports more clearly a separation of interest and of liability: and the further fact, that the Plaintiffs, on each occasion, draw a bill for one moiety of the price on one, and for the other moiety on the other Defendant, - a circumstance by no means usual in a joint contract, - Why should the Plaintiffs' agent, on transmitting the order, give information on the solvency of the Defendant Wood, who was before a stranger to them, if the Defendant

Lupton, who had dealt with them [page 28] before, was liable to the whole of the demand? The very form of the address of each letter to each Defendant, with his separate place of abode, the form of the invoice, and the indorsement of the bill of lading by each Defendant separately, agree with the supposition that the contract was several, not joint.¹⁹²

With the last case, that of *Davidson v Robertson*¹⁹³ it is difficult to understand why Ryan has introduced it given that Ryan¹⁹⁴ notes that lord Eldon refused to recognise any difference between a joint venture and a partnership.¹⁹⁵

It is submitted that these cases considered and others discussed by Ryan do not lend support for the views expressed by the Australian commentators that a joint venture is not a partnership.

The practical taxation distinction between an Australian joint venture and partnership

Harding¹⁹⁶ suggests that in the area of taxation, a joint venture is distinguishable from a partnership. This is supported by Chate.¹⁹⁷ At a later date, perhaps in reliance upon Harding and Chate; Knox¹⁹⁸, Walsh¹⁹⁹, and Leslie²⁰⁰ take up this point.

The origin of this distinction appears to lie with the US Internal Revenue Code and associated regulations wherein a partnership which is defined to include a syndicate, group, pool, joint venture, or other unincorporated organization²⁰¹ will be taxed as a corporation²⁰² unless pursuant to the regulations the Secretary exercises his discretion to exclude the organization from the application of the corporation sub-chapter where all the members of the unincorporated association elect to be so excluded and where the income of the members of the organization may be adequately determined without the computation of partnership taxable income if the unincorporated organization is availed of for the joint production, extraction, or use of property, but not for the purpose of selling services or property produced or extracted,²⁰³

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Thus an association will be taxed as a corporation according to an interpretation issued by the US Internal Revenue Service if **all** four of the following characteristics are found to exist:²⁰⁴

1. There must be associates;
2. There must be continuity of existence;
3. The control and management of the operations must be centralized; and
4. The venture must have a joint profit objective.

McIntosh and Joseph conclude that because the first three characteristics are generally found in the US oil and gas industry, one must avoid the joint profit objective to escape corporate classification.²⁰⁵ Thus, for US tax purposes an association, be it a partnership, joint venture or whatever can avoid the classification of a corporation if each of the parties, participants or partners take their share of the fruits of the venture separately and in kind. But, by so doing the association, partnership, joint venture or whatever remains as it was – it is still an association, partnership, joint venture or whatever.

The distinction arising from the participants taking the share of the fruits separately and in kind has been taken up in Australia also for tax purposes and it would seem that the Australian taxation authority is prepared to recognise the distinction. An example will suffice. The provisions relating to exploration and prospecting expenses as income tax deductions²⁰⁶ are, it would appear, not available to a person who carries on a mining business with somebody else.²⁰⁷ Thus the Commissioner will not allow the deduction to partners but will to joint venturers where the joint venturers individually take and dispose of (or otherwise deal with) their share of the product.²⁰⁸ As noted by Spry,²⁰⁹ the attitude taken by the Commissioner and what the law is are not always the same.

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It is submitted that, as in the US where a partnership and joint venture do not undergo a change of status upon the partners or participants individually disposing of their share of the product except for tax purposes, the same is true in Australia and a partnership remains a partnership notwithstanding the individual disposal of the shares of the product. The difficulties of so distinguishing a partnership from such an alleged joint venture are compounded by common business sense where, quite often, it is noted that the joint venturers separately dispose of their share of the product to the same customer. McGlinchy and Williamson²¹⁰ raise the spectre of four separate stockpiles of equal quantity and quality of the product, each stockpile

being the individual property of a separate joint venturer. That such a sale to the same customer can be effected without breaching the important requirement that each joint venturer separately dispose of its individual share of the product is explained away by the individual joint venturers each separately appointing the same agent, usually the operator or manager of the venture, to arrange such sales. The concept would smack of farce were it not necessary to tailor such an operation to negotiate a narrow path between two opinions held by the Commissioner: that a person does not carry on a mining business for the purpose of § 122J if he carries on that mining business with somebody else and yet a joint venturer who separately disposes of the product does.

Joint Ventures as recognised by statute

A joint venture is defined in § 128A of the *Income Tax Assessment Act* for the purposes of Division 11A of that Act which relates to withholding tax on certain Australian source income of non-residents. It is defined as an enterprise carried on by two or more persons in common otherwise than as partners. Because of the Division's limited operation this definition will not be considered further.

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The *Trade Practices Act* expressly recognises a joint venture and defines it as:
an activity in trade or commerce carried on jointly by two or more persons, whether or not in partnership; or carried on by a body corporate formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate,²¹¹

The purpose of the definition which was inserted into the Act in 1977 is to give effect to § 45A of that Act wherein certain joint venture arrangements, agreements, or understandings are exempt²¹² from the deeming provision of § 45A(1) which absolutely prohibits price fixing agreements.

Where such provision relates to the joint supply by the parties to the joint venture of goods or services or the supply of such goods and services in proportion to the participants' respective interests in the joint venture such price fixing agreements are not illegal *per se* but must still be considered on normal competition grounds pursuant to § 45 of the Act.

Thus the Act does not lend any weight to the proposition that a partnership can be distinguished from a joint venture nor the proposition that only a partnership can jointly supply goods or services. In fact the Act expressly provides for a joint venture to jointly supply goods and services. Admittedly the Act does not support any suggestion that the participants in a joint venture cannot take their share of the product separately and individually dispose of (or otherwise deal with) it; such an arrangement is not inconsistent with the *Trade Practices Act*.

A Possible Statutory Partnership

Because partnership is founded on the personal relationship and mutual faith and trust between partners who are known to each other, it is arguable that large scale projects involving vast capital and co-operative efforts of impersonal companies and corporations should [page 32] not be governed solely by partnership law.

Whereas a person can be held liable for the acts of his partner, which partner he chose because of his personal knowledge and faith in that partner; should a large commercial company be held liable to the same extent when there is no such personal link between such partners or when the character of the partner can change through share transactions with consequent changes in the management of one of the partners?

Modern partnership is not confined to the original personal knowledge of one's partner. In some cases partnership can be imposed through administrative action with the consequence that a partner does not have a choice with regard to the identity of his partner. In order to efficiently extract with minimum waste such a finite natural resource such as petroleum, the State can impose restrictions on the manner in which such a deposit is exploited and can require adjacent producers to co-operate in the exploitation of a common deposit.²¹³ Thus there may well be a case for change in that area of the law that imposes liability on a person for the acts of his partners.

The rationale of the Joint Venture

The taxation advantages possibly accruing to a joint venturer as opposed to partners has been discussed above. Most of the Australian commentators on the distinction assert that there is no joint liability in a joint venture as there is in partnership. This

assertion appears to be based on the premise that joint liability is peculiar to partnership and, by avoiding partnership, joint liability of the participants to a joint venture has been avoided.

Harding²¹⁴ considered this and observes: “However, if parties carry on a business enterprise ultimately under their joint control, with each contributing resources, in order to divide the product or gross receipts, the courts may be inclined to the view that they should bear [page 33] the costs of losses tortiously inflicted on outsiders”. The only commentators who have also considered the position of joint liability are Chate²¹⁵ who is of the opinion that in contracts between such a joint venture and a third party, that the liability is several and not joint should be expressly noted; Ryan²¹⁶ states that this is the usual practice with each letter and other document to third parties warning the third parties that the joint venturers are respectively severally (not jointly) liable in specified proportions; and McCann²¹⁷ who does not share Ryan’s confidence that the procedure described is the usual practice.

Conclusion

It is submitted that at the present time there is no real distinction between a joint venture and a partnership in Australia. That there are business vehicles, particularly in the area of taxation, which are capable of being distinguished and perhaps should be distinguished is recognised – it is regrettable that such vehicles are or may be described as joint ventures where that expression already possesses an albeit loose meaning elsewhere which is not consistent with the vehicle sought to be so described in Australia. If it is desirable to distinguish this vehicle from that of partnership it may be preferable to seek another expression as the Americans have done in the case of “mining partnership”. Such a term would be appropriate in Australia because the nature of the vehicle in Australia is almost without exception related to the exploitation of natural resources. It must be emphasised that American usage has not seen fit to separately describe those operations in which the participants take their profit severally and in kind. Such vehicles can still be partnerships and that word remains perfectly serviceable.

The public relations press release use of the expression “joint venture” as a more fashionable alternative to “partnership” is to be eschewed. Such [page 34] misuse of

language blunts the very tools of the language and at the minimum does grievous bodily harm to its vocabulary or worse: Holmes coined the word “verbicide” to describe such violent treatment of words.

It may even become necessary to preface our usage with a geographic label to distinguish an Australian joint venture from the other kinds.

The term “joint venture” may still have a useful role – that of a species of partnership to describe a partnership wherein the partners have their own individual businesses separate from the business of the joint venture.

- ¹ Grammatical terms used are from Jespersen O, *Essentials of English Grammar* (1933) 66 ff.
- ² *American Jurisprudence* 2d v 46, § 3; *Corpus Juris Secundum* v 48A, §§ 2 and 5; *Black's law Dictionary* (5th ed 1979) 75; *Brian PL v UDC Ltd* (CA) [1983] 1 NSWLR 490 *per* Hutley JA at pp 493, 496, 497, *per* Samuels JA at pp 504, 506, 507; Burgess R and Morse G, *Partnership Law and Practice in England and Scotland* (1980) 11; Chate MG, "Lecture VIII: The Structure of Joint Mineral Ventures", *The Law of mining in Australia*, University of Sydney Committee for Post Graduate Studies in the Department of Law (1970) 1; Chate MG, "Unincorporated Joint Ventures in Australian Mineral Development", *Private Investments and International Transactions in Asian and South Pacific Countries Symposium* (1974) 39; "Comment on 'Joint Ventures or Partnership'" (1949) 18 *Fordham Law Review* 114, 116; "Discussion on 'Mining and Petroleum Joint Ventures in Australia'" (1981) 3 *Australian Mining and Petroleum Law Journal* 23; Drake CD, *The Law of Partnership* (1983) 33; Gower LCB, *Pollock on the Law of Partnership* (15th ed 1952) 7, 8; Harding DE, "General Principles of Partnership Law", *The Use of Partnerships in Tax and Estate Planning*, Macquarie University Seminar (1976) 26, 27; Henn AG, *Agency, Partnership and other Unincorporated Business Enterprises* (1972) 279, 280; Higgins PFP and Fletcher KL, *The Law of Partnership in Australia and New Zealand* (4th ed 1981) 86 ff; Joske PE, *The Law of Partnership in Australia and New Zealand* (2nd ed 1966) 35; Knowles HJ, *Partnership* (1978) 1-22; Knox PW, "Mining Joint Ventures" (1982) 16 *Taxation in Australia* 802, 804; Leslie WD, *Joint Ventures and Farmouts* (a research paper for the LLM subject Mineral Law, 1980); *Lindley on the Law of Partnership* (14th ed 1979) 70; McCafferty BP, "Some Practical problems of Joint Venture Agreements" (1981) 3 *Australian Mining and Petroleum Law Journal* 25, 26; Miller JB, *The Law of Partnership in Scotland* (1973) 607; Nicholls HW, "Joint Ventures" (1950) 36 *Virginia Law Review* 425, 459; Note, "Partnership and Joint Venture Distinguished" (1920) 33 *Harvard Law Review* 852; Note, "Joint Venture Corporations: Drafting the Corporate Papers", (1964) 78 *Harvard Law Review* 393, 394-5; Oser R and Nicholls R, "The Structure of Mineral Ventures I: Tax Aspects", *Mining Resources Development in Australia*, University of Sydney Committee for Post Graduate [page 36] Studies in the Department of Law (1977) 151, 153; Rowley R, *Rowley on Partnership* (2nd ed 1960) ii, 464-5; Ryan GLJ, "Joint Venture Agreements" (1982) 4 *Australian Mining and Petroleum Law Journal* 101, 103; Sharwood M, "Panel Discussion on Deadlock Breaking Mechanisms in Mining and Petroleum Joint Ventures" (1980) 2 *Australian Mining and Petroleum Law Journal* 342, 343; Walsh MJ, "Joint Ventures and the Partnership Provisions", *Recent Developments in Taxation – Series A*, Taxation Institute of Australia & Monash University Seminar (1978) 1, 6; Walsh MJ, "Joint Ventures and the Partnership Provisions" (1978-9) 13 *Taxation in Australia* 478; Williams HR and Meyers CJ, *Manual of Oil and Gas Terms* (5th ed 1981) 377; Williams HR and Meyers CJ, *Oil and Gas Law* (1983) ii, 516.
- ³ Rowley R, *Rowley on Partnership* (2nd ed 1960) II 462.

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- ⁴ *op cit* 465, 466.
- ⁵ *loc cit*.
- ⁶ Jespersen, *op cit*.
- ⁷ The entry for “venture” in the *Shorter Oxford English Dictionary* notes the word as an aphetic form of “adventure”; Henn AG, *Agency, Partnership and Other Unincorporated Business Enterprises* (1972) uses “joint venture” after introducing the topic as “joint (ad)venture”; the usage by Williams HR and Meyer CJ, *Manual of Oil and Gas Terms* (4th ed 1976) and Rowley, *op cit* indicates there is no distinction between “joint venture” and “joint adventure”.
- ⁸ Merralls JD, “Mining and Petroleum Joint Ventures in Australia” (1981) 3 *Australian Mining and Petroleum Law Journal* 1.
- ⁹ *Pollock on the Law of Partnership* (15th ed 1952) 6, 9-11; *Lindley on the law of Partnership* (14th ed 1979) 13; Miller JB, *The Law of Partnership in Scotland* (1973) 7-12.
- ¹⁰ Merralls, *op cit* 3.
- ¹¹ Lindley, *op cit* 13; Miller, *loc cit*.
- ¹² Berman HJ, *Joint Ventures between United States and Soviet Economic Organisations* (1974) *passim*.
- ¹³ *ibid* 15.
- [page 37]
- ¹⁴ Mechem F, “The Law of Joint Ventures” (1931) 15 *Minnesota Law Review* 644; Roley, *op cit*; Merralls, *op cit*; Ryan GLJ, “Joint Venture Agreements” (1982) 4 *Australian Mining and Petroleum Law Journal* 101; Walsh MJ, “Joint Ventures and the Partnership Provisions” (1978-9) 13 *Taxation in Australia* 478; Leslie WD (1980) *Joint Ventures and Farmouts* (A research paper for the LLM subject Mineral Law); Knox PW, “Mining Joint Ventures” (1982) 16 *Taxation in Australia* 802; Harding DE, “General Principles of Partnership Law”, *The Use of Partnerships in Tax and Estate Planning* (Macquarie University Seminar 1976) 1.
- ¹⁵ § 5(1) *Partnership Act* 1958 (Vic); § 1(1) *Partnership Act* 1890 (UK).
- ¹⁶ § 3 Vic; § 45 (UK).
- ¹⁷ § 67, Schedule 2; previously § 19 and Schedule 3 of the *Companies Act* 1961 (Vic).
- ¹⁸ *Interpretation Act* 1978 (UK) § 5; Lindley, *op cit* 65.
- ¹⁹ Rowley, *op cit* I, 65 ff; *American Jurisprudence* 2d, *op cit* v 46, 25.
- ²⁰ Lindley, *op cit* 117.
- ²¹ *Commissioners of Inland Revenue v Marine Turbine Coy* [1920] 1 KB 193, 203; *Smith v Anderson* (1880) 15 Ch D 247, 277-8 (CA); *Ballantyne v Raphael* (1880) 15 VLR 538; *Williams v Robinson* (1891) 12 LR (NSW) (Eq) 34, 36; see also Walsh MJ, “Joint Ventures and the Partnership Provisions”, *Recent Developments in Taxation – Series A*, Taxation Institute of Australia & Monash University Seminar (1978) 1, 3.
- ²² *The Law of Partnership in Australia and New Zealand* (4th ed 1981) 56, 57.
- ²³ (1871) 2 ALR 40.
- ²⁴ *op cit* 3.
- ²⁵ *ibid* 5, 6.
- ²⁶ *Canny Gabriel Castle Jackson Advertising PL v Volume Sales (Finance) PL* (1974) 131 CLR 321.
- ²⁷ *op cit*.

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- ²⁸ *op cit* (1982) 16 *Taxation in Australia* 802, 804-5.
- ²⁹ *op cit* 3.
- ³⁰ *op cit* 116; see also Pollock, *op cit* 7-8 and Drake CD, *The Law of Partnership* (1983) 33.
- [page 38]
- ³¹ (1974) 131 CLR 321, 323.
- ³² *ibid.*
- ³³ *op cit* 12.
- ³⁴ *ibid* 27.
- ³⁵ *Partnership Act* 1958 (Vic); § 32(b) *Partnership Act* 1890 (UK); see also Lindley, *op cit* 116 and note page 13; see also respondent counsel's argument at page 324 of the *Canny Gabriel* case (1974) 131 CLR 321.
- ³⁶ *Limited Partnership Act* 1908-63 (Tas); *Limited Partnership Act* 1808 (WA).
- ³⁷ Rowley, *op cit* i 94, ii 464-5; see also Lindley, *op cit* 116.
- ³⁸ *ibid* ii 462.
- ³⁹ *Dictionary of English Law* (2nd ed 1977) ii, 1442.
- ⁴⁰ *op cit* 5-6.
- ⁴¹ § 5(1) *Partnership Act* 1958 (Vic); § 1(1) *Partnership Act* 1890 (UK) which sections define "partnership".
- ⁴² § 6 *Partnership Act* 1958 (Vic); § 2 *Partnership Act* 1890 (UK) which sections provide rules for determining the existence of a partnership.
- ⁴³ (1909) vii, 1431; see also *A Standard Dictionary of the English Language* (1893) ii.
- ⁴⁴ *Concise Etymological Dictionary of the English Language* (1894); see also Partridge E, *Origins* (4th ed 1966).
- ⁴⁵ *op cit* i 2 ff.
- ⁴⁶ *op cit* ii.
- ⁴⁷ *ibid* 13.
- ⁴⁸ Pollock, *op cit* 9 ff.
- ⁴⁹ Lindley, *op cit* 13.
- ⁵⁰ *op cit* 38.
- ⁵¹ *Partnership Act* 1890 (UK); § 4 *Partnership Act* 1958 (Vic): "The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act."
- ⁵² Miller, *op cit* 7-8.
- ⁵³ *op cit* 11-2.
- [page 39]
- ⁵⁴ *cf* *Brian PL v UDC Ltd* [1983] 1 NSWLR 490 (CA).
- ⁵⁵ Lindley, *op cit* 425.
- ⁵⁶ Knox PW, "Mining Joint Ventures" (1982) 16 *Taxation in Australia* 802, 804.
- ⁵⁷ *Partnership Act* 1958 (Vic); § 2(2) *Partnership Act* 1890 (UK).
- ⁵⁸ *ibid*; § 11(a) *Partnership Act* 1890 (UK).
- ⁵⁹ *Willett v Chambers* (1778) 2 Cowp 814; *Rhodes v Moules* [1895] 1 Ch 236; *Brydges v Branfill* (1842) 12 Sim 369.
- ⁶⁰ At pp 804-5; see also Leslie WD, *op cit* 2-4.
- ⁶¹ "Joint Ventures and the Partnership Provisions", *Recent Developments in Taxation – Series A* (1978) 1.
- ⁶² *ibid* 5.
- ⁶³ *ibid* 5-6.

⁶⁴ Note 34 *supra*.
⁶⁵ *op cit* 7-8.
⁶⁶ Note 6 *supra*.
⁶⁷ § 4(2) *Partnership Act* 1890 (UK).
⁶⁸ *ibid* § 9, *cf* § 13 *Partnership Act* 1958 (Vic).
⁶⁹ *ibid* § 47.
⁷⁰ *Partnership Law and Practice* (1980) 11.
⁷¹ § 6(1).
⁷² *cf* § 3 *Partnership Act* 1958 (Vic); § 45 *Partnership Act* 1890 (UK).
⁷³ § 31(1)(a) *Uniform Partnership Act* (US).
⁷⁴ § 23(1), *cf* § 27(1) *Partnership Act* 1890 (UK) and § 31(1) *Partnership Act* 1958 (Vic).
⁷⁵ *Rowley on Partnership* (2nd ed 1960) i, 39.
⁷⁶ *ibid* 50.
⁷⁷ *ibid* 65 ff.
⁷⁸ Henn HG, *Agency, Partnership and other Unincorporated Business Enterprises* (1972) 279-80; Note “Joint Venture Corporations” (1964) 78 *Harvard Law Review* 393, 394.

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⁷⁹ *Partnership Act* 1958 (Vic) § 9; *Partnership Act* 1890 (UK) § 5; *Uniform Partnership Act* (US) § 9(1).
⁸⁰ Rowley, *op cit* i 70; Williams and Meyers, *op cit* ii 524, 508.
⁸¹ Rowley S, “The Corporate Partner” (1930) 14 *Minnesota Law Review* 769, 776.
⁸² Rowley, *op cit* i 77; see also 50 *cf* 39.
⁸³ *ibid* 93 ff; *Black’s Law Dictionary* (5th ed 1979) 1010; Henn *op cit* 13; see also Lindley 116 for the English equivalent.
⁸⁴ *ibid*.
⁸⁵ *Uniform Partnership Act* (US) § 31(1)(a) and *supra* note 71.
⁸⁶ *Uniform Partnership Act* (US) § 6(1).
⁸⁷ Rowley, *op cit* i 88.
⁸⁸ *ibid* 89.
⁸⁹ Henn, *op cit* 279; Sullivan RE, *Handbook of Oil and Gas Law* (1955) 521-2; Williams and Meyers, *op cit* ii 499, 434, 518; *Black’s Law Dictionary* (5th ed 1979) 898.
⁹⁰ *ibid*.
⁹¹ *ibid*.
⁹² *Partnership Act* 1958 (Vic) § 28(7).
⁹³ *Uniform Partnership Act* (US) § 18.
⁹⁴ *Central Mortgage and Housing Corp v Graham et al* (1973) 43 DLR (3d) 686.
⁹⁵ [1923] 3 DLR 339, 342.
⁹⁶ *supra* note 1.
⁹⁷ *Tyser v Shipowners Syndicate (Reassured)* [1896] 1 QB 135.
⁹⁸ Lindley, *op cit* 71.
⁹⁹ (4th ed) v 35, ¶ 8.
¹⁰⁰ Lindley, *op cit* 72 ff; § 2(1) *Partnership Act* 1890 (UK); § 6(1) *Partnership Act* 1958 (Vic).
¹⁰¹ *op cit* 7-8.
¹⁰² Bell, *Commentaries on the Law of Scotland* ii, *Principle* § 392.
¹⁰³ *op cit* 10-11.

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- ¹⁰⁴ *ibid.*
¹⁰⁵ *supra* note 6.
¹⁰⁶ *op cit* 607 ff.
¹⁰⁷ *ibid* 607.
¹⁰⁸ *ibid*; § 1(1) *Partnership Act* 1890 (UK); § 5(1) *Partnership Act* 1958 (Vic).
¹⁰⁹ *loc cit.*
¹¹⁰ *ibid*; § 36(b) *Partnership Act* 1958 (Vic).
¹¹¹ *op cit* 613.
¹¹² *ibid* 613-6.
¹¹³ § 5 *Partnership Act* 1890 (UK); § 9 *Partnership Act* 1958 (Vic).
¹¹⁴ *op cit* 633-4.
¹¹⁵ *op cit* 3.
¹¹⁶ Henn, *op cit* 13; see also Rowley, *op cit* i 94.
¹¹⁷ *ibid.*
¹¹⁸ *supra* note 87.
¹¹⁹ Henn, *op cit* 279; Sullivan, *op cit* 522; Rowley, *op cit* ii 519-20.
¹²⁰ Williams and Meyers, *op cit* ii 518.
¹²¹ *ibid.*
¹²² *American Jurisprudence* (2d) v 46, § 3; *Corpus Juris Secundum* v 48A, § 5.
¹²³ Rowley, *op cit* ii 482.
¹²⁴ *ibid* 478.
¹²⁵ *ibid* 483, 539; Williams and Meyers, *op cit* ii 517.
¹²⁶ *ibid* 487, 539-40; *American Jurisprudence* (2d) v 46, § 1; *Corpus Juris Secundum* v 48A, § 5; *Ballentine's Law Dictionary* (3rd ed 1969) 675.
¹²⁷ *ibid* 526.
¹²⁸ *Black's Law Dictionary*, *op cit* 753.
¹²⁹ *Meinhard v Salmon* (1928) 249 NY 458, 164 NE 545 *per* Cardozo CJ; Note "Joint Venture Corporations" (1964) 78 *Harvard Law Review* 393, 394; Williams and Meyers, *op cit* ii 377-8, 521, 523.

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- ¹³⁰ *supra* note 94.
¹³¹ *Central Mortgage and Housing Corp v Graham et al* (1973) 43 DLR 686.
¹³² *ibid* 703.
¹³³ *The Law of Partnership in Australia and New Zealand* (4th ed 1981) 57.
¹³⁴ *Canny Gabriel Castle Jackson Advertising PL v Volume Sales (Finance) PL* (1974) 131 CLR 321.
¹³⁵ Merralls, *op cit*; McCafferty BP, "Some Practical Problems of Joint Venture Agreements" (1980) 3 *Australian Mining and Petroleum Law Journal* 25; Harding, *op cit*; Walsh, *op cit*; Ryan CLJ, "Joint Venture Agreements" (1982) 4 *Australian Mining and Petroleum Law Journal* 101; Knox, *op cit*; Chate, *op cit*; Sharwood M, "Panel Discussion on Deadlock Breaking Mechanisms in Mining and Petroleum Joint Ventures" (1980) 2 *Australian Mining and Petroleum Law Journal* 342; "Discussion on Taxation" (1977) 1 *Australian Mining and Petroleum Law Journal* 143; Leslie, *op cit*; Oser and Nicholls, *op cit*; Lanigan PJ, "Comment on the Structure of Mineral Ventures", *Mining Resources Development in Australia* (1977) 258; Tuckfield, *op cit*; Tuckfield J, "Comment on Exploration and Mining Concessions – Minerals", *Mining Resources Development in Australia* (1977) 141; White J and Nicholls R,

136 “The Structure of Mineral Ventures II – Financing”, *Mining Resources*
 137 *Development in Australia* (1977) 270.
 138 *op cit* 1.
 139 *op cit* 26-7.
 140 *op cit* 101.
 141 *op cit* 2.
 142 *op cit* 803.
 143 *op cit* (1969) 2; *op cit* (1975).
 144 *op cit* 16.
 145 Donald BG and Heydon JD, *Trade Practices Law* (1978) i 181.
 146 *op cit* 1.
 147 Sharwood, *op cit* 343.
 148 *op cit*.
 149 *op cit*.
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 148 *op cit*.
 149 Walsh, *op cit* 5; Knox, *op cit* 804.
 150 Walsh, *loc cit*.
 151 *ibid* 5-6.
 152 Knox, *op cit* 804-5.
 153 *ibid* 802; Walsh, *op cit* 5.
 154 § 1(1) *Partnership Act* 1890 (UK); § 5(1) *Partnership Act* 1958 (Vic).
 155 *loc cit*.
 156 *loc cit*.
 157 *op cit* (1969) 2.
 158 *op cit* 26.
 159 (1974) 131 CLR 321.
 160 *ibid* 328.
 161 *ibid* 325.
 162 *ibid* 324.
 163 *Brian PL v UDC Ltd* (CA) [1983] 1 NSWLR 490.
 164 Leave to appeal to Privy Council granted July 4, 1983.
 165 [1983] 1 NSWLR 490.
 166 Hutley, Samuels and Mahoney JJA.
 167 *per* Hutley JA at 497.
 168 *per* Samuels JA at 506 citing Lindley.
 169 *per* Hutley JA at 496 citing MacWilliam, “Fiduciary Relationships in Oil and
 Gas Ventures” (1970) 8 *Alberta Law Review* 233; *per* Samuels JA at 505
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 170 *per* Hutley JA at 496; *per* Samuels JA at 506.
 171 *ibid* 499.
 172 *ibid* 500.
 173 *ibid* 502.
 [page 44]
 174 *ibid* 503.
 175 “Fraser Isle sand ban settled for \$4 m”, *The Melbourne Age*, page 21 (June 16,
 1984).

¹⁷⁶ *Murphyores Incorporated PL and others v The Commonwealth* (1975-6) 136
 CLR 1.
¹⁷⁷ *ibid* 6, 8 *per* McTiernan J; *per* Stephen J at 9.
¹⁷⁸ *ibid* 15 *per* Mason J.
¹⁷⁹ *op cit* 33.
¹⁸⁰ *op cit* 610.
¹⁸¹ (1780) 1 Dougl 371; 99 ER 239.
¹⁸² *op cit* 102.
¹⁸³ *ibid* 104.
¹⁸⁴ 3rd ed, v 28, 486; 4th ed, v 35, ¶ 8.
¹⁸⁵ *op cit* 1.
¹⁸⁶ (1780) 1 Dougl 371; 99 ER 239.
¹⁸⁷ (1780) 1 Dougl 373; 99 ER 240 *per* Lord Mansfield.
¹⁸⁸ (1780) 1 Dougl 371-2; 99 ER 239.
¹⁸⁹ (1780) 1 Dougl 373; 99 ER 240 *per* Butler J.
¹⁹⁰ (1788) 1 H Bl 37; 126 ER 24.
¹⁹¹ (1832) 9 Bing 297; 131 ER 626.
¹⁹² (1832) 9 Bing 304; 131 ER 629 *per* Tyndal CJ.
¹⁹³ (1815) 3 Dow 218; 3 ER 1044.
¹⁹⁴ *op cit* 103.
¹⁹⁵ (1815) 3 Dow 229; 3 ER 1048.
¹⁹⁶ *op cit* 26.
¹⁹⁷ *op cit* (1974) 44; (1970) 2.
¹⁹⁸ *op cit* 803.
¹⁹⁹ *op cit* 8-10.
²⁰⁰ *op cit* 16.
²⁰¹ § 761 *Internal Revenue Code* (US) 1954.
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²⁰² Harding, *op cit* 26; McIntosh DL and Joseph GE, “Accounting and Tax aspects
 of Oil and Gas Joint Ventures” (1965) 26 *Ohio State Law Journal* 546, 552;
Miller’s Oil and Gas Federal Income Legislation (1983) 26.3.
²⁰³ § 761(a)(2) *Internal Revenue Code* (US) 1954.
²⁰⁴ McIntosh and Joseph, *op cit* 553.
²⁰⁵ *ibid*; see also *Miller’s Oil and Gas Federal Income Legislation* (1983) 26.3-
 26.4.
²⁰⁶ *Income Tax Assessment Act* (C’th) § 122J.
²⁰⁷ Spry ICF, “Comment on Taxation of the Mining and Petroleum Industries”,
 (1977) 1 *Australian Mining and Petroleum Law Journal* 141, 143.
²⁰⁸ *ibid* 145.
²⁰⁹ *ibid*.
²¹⁰ “Discussion on Trade Practices”, (1977) 1 *Australian Mining and Petroleum
 Law Journal* 120.
²¹¹ § 4J(a).
²¹² § 45A(2).
²¹³ eg *Petroleum (Submerged Lands) Act* 1967-80 (C’th) § 59; *Petroleum Act* 1958
 (Vic) § 63; *Petroleum (Submerged Lands) Act* 1982 (Vic) § 59; and similar
 legislation for the other Australian states.
²¹⁴ *op cit* 11.
²¹⁵ *op cit* (1974) 46.

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²¹⁷ (1982) 4 *Australian Mining and Petroleum Law Journal* 256.

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APPENDIX: Comparison of *Partnership Acts*: Victoria, United Kingdom, and the United States *Uniform Partnership Act*.

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