

**Barrymore S. “Aspects of Joint Ventures—Position of Operator/Manager” Paper presented at *Second Annual Australian Mining and Petroleum Law Association (WA Branch) State Conference*, Scarborough, Perth, 22 October 1988.**

Barrymore considers the function of the operator (noting the distinction between “gratuitous” and “contractual” agent) and the obligations and scope of its power and discretion, in particular, the standards of performance and care required and the nature and extent of indemnity clauses given by the principal to the agent for loss or damage to third parties. The author then considers the liability of the operator to the joint venturers (principal), and the potential significance of wilful misconduct, gross negligence, bad faith and acts beyond authority. He then examines the responsibility of a manager for programs and budgets, and discusses the devices that permit the operating committee to maintain ongoing supervisory control over prudential issues. The section concludes by considering the nature of express provisions authorising the manager to delegate duties and responsibilities.

**Smith W.B. “Comment on Operator of a Joint Venture - Principal or Agent” [1987] *Australian Mining and Petroleum Law Association Yearbook* 288**

Smith provides a short comment on the practical and legal consequences that may flow from the creation of an agency relationship between the operator and its co-venturers. He discusses two incidents of that relationship that have considerable impact on the affairs of the joint venture, namely the doctrine of the undisclosed principal and the existence of ostensible authority in the agent. He concludes that the prospect of the operator entering into contracts with the ostensible authority of the venturers will mean that, whatever the intention of the parties regarding the manner of contracting may be, the venturers will need to exercise considerable care to ensure that operations are not conducted in a manner which will give rise to representations regarding the operator’s authority.

### **3.3 Third Party Liabilities**

#### ***Articles***

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The third part of Barrymore’s paper considers contracts with third parties and discusses liability between venturers and third parties, and between operators and third parties. He examines the rules relating to undisclosed principal, and describes the situation in which that rule may be prevented by the parole evidence rule. In light of *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (“McNiece”) it may be unnecessary to resort to principles of agency and undisclosed principal to enable to venturers to enforce contracts made between operator and third parties.

Barrymore offers suggestions as to how clauses may be drafted in the joint venture agreement such that operators are required to expressly admit the joint venturers having the benefit of any contract made with third parties, and to allow an operator to claim loss or damage suffered by either itself or the joint venturer in an action for the loss.

In his discussion of rights of enforcement by joint venturers not party to contracts between the operator and third parties, Barrymore contrasts and analyses the effect of *McNiece* with section 11 of the *Property Law Act* (WA) 1969, which confers certain rights of action on persons who are not party to a contract, arguing that the *Property Law Act* requires the party benefiting from the contract to be named, not just member of a class of persons deriving benefit.

Cases:

*Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107

Legislation:

*Property Law Act* (WA) 1969

### ***Books***

**McFarlane T. “Third Party Liability of Joint Venturers” in *The Rights and Duties of Joint Venturers in Tough Times*, Papers delivered at a 2-day Master Class, Business Law Education Centre, Melbourne November 1990, Part 4**

Included in McFarlane’s paper is an outline of the liabilities venture participants, officers and financiers may be exposed to, according to the particular choice of venture structure: incorporated, unincorporated, trust, or partnership form. The author also canvasses the extent to which participants may be held personally liable to third parties, and offers suggestions as to how and when parties can be indemnified against such liabilities.

Cases:

*Heys & Barrow v CSR and Midalco Pty Ltd* (1989) Unreported, Supreme Court of Western Australia, 4 August 1988

## **3.4 Disclosure and Confidentiality**

### ***Articles***

**Bean J.M.D. “Duties of Disclosure and Confidentiality in JOAs” (1993) 11 *Journal of Energy and Natural Resources Law* 75**

Bean considers fiduciary duties concerning information—the duty of disclosure and the duty of confidentiality—and their applicability in a joint venture agreement (JOA). He first discusses the circumstances in which a duty of full disclosure arises, and what the content and extent of that