Index

Account of profits

breach of fiduciary duty, 90, 381 default by joint venturer, 381

Agent

principles and fiduciary relationships, 73-4

Agreement

finance see Finance agreement infrastructure, 189 joint venture see Joint venture agreement operating, joint, 4, 10, 27, 52 transport, 189

Ancillary restraints, 456, 458-60

Electric Lamp Manufacturers (Australia) Pty Ltd, 462-3 Hydrocarbon Products Pty Ltd, 458-60

Anti-competitive conduct

Australia see Competition and Consumer Act 2010 (Cth) US see United States

Anton Piller order, 91

Arbitration

government joint venture default, 396-7 international joint ventures, 358-61

Assignment

clause in agreement, 191-3
void as contrary to public policy,
193
conflict of law principles, 212
consent of co-venturers, 191-2
improper, 364 see also Default
intellectual property
assignment into joint venture, 491-2
developed by joint venture, 499
licence, right under, 495
warranties and indemnities, 496-7

joint venturer's right to, 189-96 personal property under PPSA, 195-6 pre-emptive rights of co-venturers, 208-10 prohibition or restriction, 192-4 public private partnership, restrictions, 314 resources joint venture, interests in, 420-9 change of ownership or control, 427-8 consent of co-venturers, 425 minimum interests, 425 part of interest, 420 partition, prohibition, 427 pre-emptive rights, 420-9, 426 restraints on alienation, prohibition, restrictions on offers, 423-4 rule against perpetuities, 422

sales contract, rights under, 212-18 Australian Competition and Consumer Commission (ACCC)

anti-competitive conduct under CCA, evaluation, 442, 452 authorisations for joint ventures, 441-2, 457 cartel provisions, 455 exclusionary provisions, 455 evaluation process, 439, 455-67 mergers, clearances, 451 research and development, 457 time limit, 457

Australian Consumer Law See also Competition and Consumer Law unconscionable conduct, 121-4

Bailment, 173-4

Banks

Code of Banking Practice, 249-50 considerations for financiers, 250

BHP Petroleum Pty Ltd, 465 floating price phase, 264 industry assistance, 273 Bi-lateral investment treaties, 361-3 Jobs and Competitiveness Program, 273-5**Bonds** Kyoto protocol, 263, 265 financing joint venture, 144-5 liable entities under, 269-73 inflation-indexed, 145 natural gas suppliers, 272-3 wrapped or unwrapped, 144-5 operational control over facilities, Breach of fiduciary duty, 48-9, 82-5 270-2 account of profits, 90-1, 381 structuring to take into account, causation, 48, 89 276-7 compensation, equitable, 90, 379-80 'opt-in mechanism for fuels, 269 defences, 49, 85-9 overview of scheme, 263-4 consent, 85, 208 pass-through of costs, 277-9 estoppel, 85 price increases, general, 276 laches, 49, 85 repeal of scheme, possibility, 279 unclean hands, 85 Cartels dishonesty, 82 see also Competition and Consumer equitable remedies, 89-91 Act 2010 (Cth) exclusion from subsequent projects, 82 concept of, 440 fiduciary relationship see Fiduciary exceptions to prosecution 442-50 relationship arrangements or understandings, injunction, 76, 91 contained in, 448-50 loss, proof of, 48-9, 83 contract, contained in, 443-5 misrepresentation, 82, 208 non-competition provisions, 446 misuse of property, 82 production/supply of goods or no intention to deceive, 83 services, 447-8 non-disclosure of information, 78, 83-5 purposes of the joint venture, for, Brickenden principle, 88-9 445-7remedies, 48-9, 89-91 fault element, 440 equitable, 89-91 mergers, 450 third parties, against, 91-2 price fixing, 450 rescission, 91 provisions, 438 scope of duties, 74-80 giving effect to, 441 strict liability, 82 third party liability, 82 Choice of law undisclosed acquisitions, 82 absence of, 332-9 Anglo-Australian law, 334-5 Breach of warranty law of state with closest connection, letter of comfort, 222 non-recourse financing, 243 personal intention of parties, 331 Broken Hill Proprietary Company/ Rome Convention, 335-6 Koppers Australia Pty Limited, 464 US Restatement Second, 337-8 acta jure gestionis, 327 **Building societies, 12** acta jure imperii, 327 applicable law, 324 **Business** case bias, avoiding, 328 Australian PPP model, 285 bona fide choice, 340-1 Carbon pricing clauses, 327-9 coal-fired electricity generation, 275 Dicey and Morris rule 330, 334 coverage and exclusions, 267-9 evasion of law, 341-3 emissions trading scheme, 265-7 express choice, 327-9 fixed price phase, 264 fraus legis, 341

inferred choice, 329-32 intention of parties, 329-32 international joint ventures, 321-5 international law, 329 joint venture agreement, 210 lenders, significance for, 210 lex loci contractus, 334, 338-9, 351 lex loci solutionis, 334, 338-9, 350-1 lex situs, 334 mandatory rules, 346-53 forum, of, 371 non-enforcement of public laws, 351-3proper law, of, 348 (Cth) third country, of, 348-51 negotiating clause, 328 neutral third country, 329 non-enforcement of foreign public laws, 351-3 objective approach, 325 party autonomy, 326-7 mandatory rules limiting, 346-53 public policy limiting, 339-41 private international law, 330 proper law of contract, 324 mandatory rules, 348 public policy, 339-41 Rome Convention, 324, 326, 330, 335-6, 339-46 subjective approach, 325 third country, 329 close connection, 350 mandatory rules of, 348-51 otherwise applicable law, 349-50 unconnected law, 343-6 US Restatement Second, 324, 326, 330, 337-8, 341-6 Climate change effects and ramifications, 260-1 452 carbon costs see Carbon pricing design warranties, 261-2 insurance issues, 262 output specifications, 262

Collateralisation clause, 66

Kyoto protocol, 263, 265

legislation, 263

duty to disclose, 91 injunction against reliance on, 91 obtaining financial advantage by, 82

performance specifications, 261

Comalco Limited, 461-2

Commenda, 12, 25

Commonwealth Serum Laboratories Commission/Novo, 464-5

Compensation

breach of fiduciary duty, 90-1, 379-80 equitable, 90-1, 379, 394 public private partnership termination, 299-304 government default, 300-1 project company default, 302-4 quantum of loss, 380

Competition and Consumer Act 2010

ACCC evaluation process, 439, 455-67 ancillary restraints, 456, 458-60 Electric Lamp Manufacturers (Australia) Pty Ltd, 462-3 Hydrocarbon Products Pty Ltd, 458-60 authorisations for joint ventures, 439, 455-67 withdrawal, 457 benefit to public, 455 cartel provisions, 438 concept of, 440 exceptions, 442-50 fault element, 440 giving effect to, 441 competitive effects of joint ventures, 'co-operative joint ventures', 451 Sagasco Resources Limited, 466 exclusionary provisions, 454 exclusive supply agreement, 464 BHP Company/Koppers Australia Pty Limited, 464 exemptions, 441-2 'future-with-and-without' approach, joint marketing, 457, 460, 465, 467 BHP Petroleum Pty Ltd, 465 Macadamia Company and Suncoast Gold Pty Ltd, 465-6 Woodside Petroleum Development Pty Ltd, 460 joint venture, definition, 4, 439-40

management committee, state powers,

market-sharing agreements, 461

ACCC clearances for, 451

mergers, 450

horizontal, 450

Competition and Consumer Act 2010

(Cth) (cont)

non-competition provisions, 446

notifications, 441-2

Part IV, application,

Division 1, 442-9

Division 2, 450-4

price fixing, 450

Howard Smith Industries Pty Ltd and Adelaide Steamship Industries Pty Ltd, 461

pro-competitive joint ventures, 461-2 Comalco Limited, 461-2

prohibitions, cartel and civil, 440-1 restriction of competition, analysis,

'future-with-and-without' test 452 market structure, 452, 464-5

participants as competitors, 452, 460, 462-3

sharing of risk, 453

scheme of, 439-42 sharing of risk, 453

substantially lessening competition

provisions, 441

unconscionable conduct, 121-4

Completion

covenant, 205-6, 220-22 guarantee, 205, 220, 319

letter of comfort, 221-2

liquidated damages for lack of, 319

risk, 148

what constitutes, 205

Confidential information, 484-9

see also Intellectual property breach of confidence, 488

breakdown of negotiations, 486

cause of action, elements, 485-6 confidentiality agreement, 485, 487

duty not to misuse, 41

employees, 488-9

lenders, disclosure to, 206

negotiations, disclosed during, 486

obligations, 485

ownership, 486

property, whether, 484

statutory regulation, 485 trade secrets, 488

Constructive trust, 22, 41

default by joint venturer, 381

fiduciary duty, breach of, 90 liability of trustees for breach of trust, 82

Contract management Australian PPP model, 284

'Co-operative joint ventures', 451

Copyright, 476-80

see also Intellectual property computer software, 477

duration, 477

employees, 479-80

joint authorship, 477-9

scope of protection, 477

Cost book company, 3, 10, 25 mining partnership compared, 9

Cross-charges

deed of cross-charge, 200

joint venture agreement provisions,

lenders, significance for, 201

personal property, 202-4

PPSA, under, 171, 203-4

priority, 202-3

registration, 201, 204-5, 209

resources joint venture, 209, 434-5 enforcement on default, 434-5

Cross-security

deed of, 200

Crown

see also Government

authority to contract, 231

agency, application of rules, 231

binding the Crown, 233

government departments, 231

head of executive, 231

implied or ostensible authority, 231

Ministers, 231-2

oral guarantees, 232

definition and meaning, 223

government operating as, 288-9

immunity, 233

coercive orders, from, 235-6

execution, from, 236

statute, from, 233-5

suit, from, 233

intellectual property, privileges, 507

legislation

bound by own, whether, 233-4

Crown made contractually subject

State, whether bound by, 234-5

termination of contracts, 236-41 executive necessity, 236-9 fettering execution of power or discretion, 239 future flexibility, binding of, 239 legislate in a particular way, cannot bind, 240 sovereign risk, 240-1 Damages government joint venture default, 392-3 limited recourse financing, 242-4 liquidated, 319 non-completion, 319	misuse of assets, 364 remedies, 365 account, 380-1 arbitration, 396-7 constructive trust, 381 damages, 392-3 equitable compensation, 379-80, 394 estoppel, 393-4 government joint ventures, 390-1 injunction, 391-2 non-government joint ventures, 378-90 relief against forfeiture, 382-7 relief against penalty, 387-90 resources joint venture default,
performance levels not met, 319 Deadlock or impasse implication of terms, 371-4 cooperation, 372 good faith or reasonableness, 371 joint venture agreement provisions, 370-8 buy out of interest, 367-9, 370 dilution of interest, 369, 370 dispute resolution, 370 lack of, 370 partition, 374-8 resources joint venture, 407-19	restitution, 395-6 specific performance, 390-1 resources joint venture, 429-37 compulsory sale of interest, 435-6 cross-charge, enforcement of, 434-5 dilution of interest, 433-4 forfeiture of interest, 431-3 loss of rights to product or proceeds of sale, 434-5 parent company guarantees, 436 specific remedies, 429-37 staged remedies, 436-7 types of, 364-5
assigning interests improperly, 364 breach of fiduciary duty, 379-80 breakdown of venture, 365 charging assets without consent, 364 deadlock see Deadlock or impasse failure to make contribution, 364 failure to participate properly, 364 finance agreement provisions, 168 joint venture agreement provisions, 366-70 buy out of interest, 367-9, 370 consequences, 196-7 continuation of venture, 199 delay before exercise of powers, 197 dilution of interest, 369 enforcement of procedures, 197-8 forfeiture of interest, 369-70 lenders' powers, 169, 199-200 loss of joint venture rights, 366-7 powers of non-defaulting venturers, 204-5 registrable charge, 201 lenders' powers, 169, 199-200	Definition of joint venture Competition and Consumer Act 2010 (Cth), 4, 439-440 Income Tax Assessment Act 1936 (Cth), 4 international, lack of, 321-2 Designs protection, 480-2 see also Intellectual property Directors definition, 151 indemnity, 152 liability, 151-2 shadow, 151-2 Disclosure of information Chinese wall, 87 confidential information see Confidential information fiduciary duty, 83-5 207-8 actual knowledge of facts, 86 breach by nondisclosure, 83-5 Brickenden principle, 88-9 copies of documents, 88

Disclosure of information (cont)

fiduciary duty (cont)
expert opinion and advice, 87
information not acquired as fiduciary, 87
to whom owed, 86
lenders, to, 206

Dispute resolution

international joint ventures, 357-63 arbitration, 358-61 bi-lateral investment treaties, 361-3 considerations, 357-8 public private partnership contract, 306-7

Dissolution of joint venture

breach by party, 43-4 obligation to share losses 37-40 termination of undertaking, 4, 34

Documentation

finance agreement, 165-8, 187 intellectual property *see* Intellectual property joint venture agreement *see* Joint venture agreement project infrastructure agreement, 168-9

Due diligence

lenders, 315, 318 public private partnerships financing documentation, 315 risk management, 298

Electric Lamp Manufacturers (Australia) Pty Ltd, 462-3

Emissions trading scheme, 265-7

Employees

intellectual property ownership confidential information, 487-8 copyright, 479-80 developed through joint venture, 506-7 patents, 475

Equitable estoppel, 85, 393, 396

Equity, 37-40, 48-9 remedies, 89-92 proportionality, principle of, 90 third parties, against, 91-2

Equity finance, 146 disclaimer provisions, 320

minimum level of equity, 320

Estoppel

defence to breach of fiduciary duty, 85 doctrine of, 393 equitable, 85, 393, 396 government, against, 233, 393-4 proprietary, 2, 22, 48

Exclusionary provisions, 454

see also Competition and Consumer Act 2010 (Cth) defences, 454

Executive necessity, 236-9, 393-4

Export Credit Agency funding, 143-4

Feasibility studies, 318

Fence, building of, 20

Fiduciary obligations, 2, 6, 38 acting bona fide in interests of

venture, 64 basic obligation, 45, 47 breach see Breach of fiduciary duty clause purporting to limit, 80 confidentiality, 64 contractual terms, 2, 41, 54

express undertakings, 54-5, 63-4 implied undertakings, 55-6, 64-5 pre-contractual negotiations, 53-4

co-operation, 65-6 definition of fiduciary, 45

disclosure of information, 76, 85-9, 207-8

duration, 74-5, 80-1 exclusion clause, 80

fiduciary relationship see Fiduciary relationship

framework for analysis, 49 implied undertakings, 55-6, 64-5 "instrument of public policy", 47

joint venture agreement-

manager/operator of, 73-4 terms of, 75-80, 207-8

lenders, significance for, 207-8

loyalty, duty of, 47 non-contractual, 39

partnership principles, 2, 6, 38-9

pre-contractual negotiations, 53-4, 207 reasonable expectation, 66-8 remedies for breach *see* Breach of

fiduciary duty

responsible entity of managed investrepresentations, 167 ment scheme, 257-60 warranties, 167 scope, 74-80 Finance leases unincorporated joint ventures, 45-92, PPSA, under, 171 Financial analysis Fiduciary relationship, 2, 45-6, 48-50 Australian PPP model, 285 collaborative relationship, 50, 52 commercial context, 50-2 Financing joint ventures consequences, 48-9 banking regulation, 249-50 contractual context, 53-7, 83 bonds, 144-5 pre-contractual negotiations, 53-4 inflation-indexed, 145 terms, 54-7 registration of charges, 248 duration, 74-5, 80-1 stamp duty, 248 establishing, 50-73 wrapped or unwrapped, 144-5 choice of structure, 147-9 fact-based approach, 60, 61-8 commercial considerations, 147-9 factors to be considered, 60-1 power and discretion test, 70-3 credit status of parties, 149 method of financing, 149 reasonable expectation, 66-8 risk evaluation, 147-9 status-based approach, 57, 58-61 viability of project, 147 undertaking test, 61-7 climate change ramifications, 260-1 form of joint venture, dependent on, 6 see also Carbon pricing scheme; joint stock company, 12-14 Climate change joint venture agreement-Code of Banking Practice, 249-50 manager/operator of, 73-4 completion covenants, 205-6, 220 terms of, 57-73, 75-80, 208 contingency provisions, 318-19 mutual trust and confidence, 38, 52, cross-charges see Cross-charges 68-70 debt finance, 142-6 obligations arising from see Fiduciary bond issues, 144-5 obligations commercial bank debt, 142 partnership, 2, 6, 25, 52 Export Credit Agency funding, analogy, 58-61 143-4definition, 58 full recourse, 142 power and discretion test, 70-3 leasing, 146 pre-contractual negotiations, 53-4 limited recourse, 142, 169, 242-4 scope, 49-50, 74-81 mezzanine debt, 142-3 status-based test, 57, 58-61 securitisation, 146 undertaking test, 61-7 senior debt, 142 express undertakings, 63-4 subordinated debt, 142-3 implied undertakings, 55, 64-5 superannuation fund debt, 143 vertical and horizontal, 52 disclosure of information to lenders, vulnerability, 71-3 206 documents, 165, 187 Finance agreement equity finance, 146 approvals required, 166 disclaimer provisions, 320 borrower's covenants, 167-8 minimum level of equity, 320 conditions precedent, 166 essential inquiries by financier, 249-60 default provisions, 168 feasibility studies, 318 essential provisions, 165-8 finance agreement see Finance exchange control approval, 166 agreement ministerial consents, 166 fixed and floating charge, 180-6 permitted use of funding, 166 project cash flows, over, 179, 181-2 related agreements, 187 flexibility, 147

Financing joint ventures (cont)	Fishing ventures, 10
foreign involvement, 251-4	agreement re use of licence, 21
insolvency issues, 260	product-sharing, 32-4
insurance see Insurance	Fixed charge, 177-85
joint rather than several basis, 169	
joint venture agreement see Joint	entered before PPSA commencement, 179
venture agreement	
leasing, 146	insolvency, effect, 180-1 PPSA, under, 171, 177-9
lenders' rights on default, 169, 199-200	circulating assets, 177-8
letter of comfort, 222-3	circulating assets, 177-6 circulating security interest, 178, 180
limited recourse financing, 142, 242-4	fixed charge, distinction removed,
completion covenant, 220	177-8
limiting financiers' exposure, 318-20	unperfected security interests, 181
liquidated damages, 319	project cash flows, over, 179, 181-2
liquidation of borrower, 244-7	
matters concerning lenders	Floating charge, 177-85
climate change ramifications, 260-1	automatic crystallisation clause, 182-5
corporate benefit requirement, 260	Commissioner of Taxation, priority,
financial assistance to acquire	181
shares, 254	entered before PPSA commencement,
insolvency issues, 260	179
joint venture agreement provisions,	fixed charge treated as, 177-8
247-8	insolvency, effect, 179-81
managed investment schemes,	PPSA, under, 171, 177-9
257-60	circulating assets, 177-8, 185-6
personal property, security over see	circulating security interest, 178, 180
Personal property	fixed charge, distinction removed, 177-8
priority issues, 248-9	priority regime, 172, 176, 182-3
restrictions and prohibitions,	unperfected security interests, 181
249-254	project cash flows, over, 179, 181-2
security see Security	restriction on further encumbrances,
non-recourse financing, 142, 243	182
off-balance sheet financing, 142, 149	_
permitted uses of, 166 project cash flows, over, 179, 181-2	Force majeure
project cash flows, over, 179, 101-2	definition, 294
public private partnership see Public	public private partnership
private partnership	provision for, 293-5
related-party transactions, 219-20	termination, 294
relationship between lenders and	Foreign investment
co-venturers, 187	approvals, 166, 212
risk evaluation, 147-9	choice of law see Choice of law
securitisation, 146	codes, 329
security see Personal Property Security	considerations for financiers, 212,
Act 2009 (Cth); Security	251-4
small business, 249	Foreign Acquisitions and Takeovers Act
sources of finance, 142-6	1975 (Cth), 251-4
stamp duty, 248-9	investors, constraints on, 251-4
State agreements, 241-2	joint venture agreement provisions,
State government related borrowers,	212
255	tax considerations, 251
trust, venture in form of, 255-8	Friendly societies 12

Good faith obligation	Ministers, 231-2
basis, 108, 110-11	oral guarantees, 232
common law implied, 94-139	contracts with, 224
contractual exclusion 130-137	Commonwealth, 224-5
community standards, 111, 113, 138	States and Territories, 225
compliance with honest standards of	corporations see Government owned
conduct, 110	corporations
compliance with reasonable standards	Crown, operating as, 288-9
of conduct, 110	definition and meaning, 223
content, 124-9	enforcement of contracts against, 229
contractual term	New South Wales and Queensland,
"entire agreement" clause, 135-7,	in 230
139	guarantees, 288-9
express exclusion by 130-1	immunity, 233
implied by, 125, 130	coercive orders, from, 235-6
implied exclusion by 133-7	execution, from, 236
inconsistent, 131-3	statute, from, 233-5
"opting out" clause, 134, 138	suit, from, 233
"sole discretion" clause, 133-5, 139	legislation
cooperation in achieving objects, 110	bound by own, whether, 233-4
deadlock, implication of term on,	Crown made contractually subject
371-4	to, 235
definition, 85-7, 109-10	State, whether bound by, 234-5
discretion, 126-8	Loans Council arrangements, 255
fiduciary obligation compared, 116-18	local see Local government
implication of, 97-108	power to contract, 226, 288
fact, as a matter of, 104-6, 125	set-off rights, 311
law, as a matter of, 97-104, 125	special purpose statutes, bodies
reticence, current judicial, 107-8	created under, 227
judicial approach, 96-7, 107-8	Crown control, degree of, 227
legitimate interests, 111-14, 126	immunity, 227
matter of fact, 104-6	intention of legislation, 227
matter of law, 97-104	State government related borrowers,
meaning of good faith, 109-10	255
motive, 126-8	step-in rights, 290-2
non-fiduciary joint ventures, 94-138	contractor breach, 292
objective explanation of behaviour,	no project company breach, 291
126-7	termination of contracts, 236-41
performance of contract, 125	executive necessity, 236-9
reasonable expectations, 66-8, 111, 113,	fettering execution of power or
127, 138	discretion, 239
reasonableness, 114-16	future flexibility, binding of, 239
Renard Constructions case, 94-6	legislate in a particular way, cannot
termination of joint venture, 128-9	bind, 240
unconscionability, concept of, 109,	sovereign risk, 240-1
118-24	Government joint venture
Government	see also Public private partnerships
authority to contract, 231	remedies for default, 390-7
agency, application of rules, 231	damages, 392-3
binding the Crown, 233	estoppel, 393-4
government departments, 231	injunction, 391-2
head of executive, 231	specific performance, 390-1
implied or ostensible authority, 231	er come performance, ovo 1

Government owned corporations

capacity to contract, 228

capacity to enter joint ventures, 226-30 Corporations Act, governed solely by, 226 Crown immunity, 227, 233-6 enforcement of contracts against, 229 New South Wales and Oueensland, in 230 executive necessity, 236-9, 393-4 legal status of, 227-9 local government, 226 special purpose statutes, created under, 227 Crown control, degree of, 227 immunity, 227, 233-6 intention of legislation, 227 status of public body, determining, 227 special purpose statutes, created

under, 227 State, or representing the State, 227

State, or representing the State, 227 termination of contracts, 236-41 executive necessity, 236-9 fettering execution of power or

discretion, 239 future flexibility, binding of, 239 legislate in a particular way, cannot bind, 240

sovereign risk, 240-1

Historical precursors, 7-14

Howard Smith Industries Pty Ltd and Adelaide Steamship Industries Pty Ltd, 461

Hydrocarbon Products Pty Ltd, 458-60

Immunity

Crown, 233-6 foreign entities, 210 joint venture agreement provision, 20

Incorporated joint venture, 4, 150-5

advantages, 151 board of directors, 152 constitution, 151-3, corporate veil, lifting, 152-4 directors' liability, 151-2 indemnity, 152 insolvent trading, 151-2 nominee directors, 152 shadow directors, 151 disadvantages, 155 documentation, 150 insolvent trading, 151-2 liability of participants, 151-5 nature of, 150 nominee directors, 152 operating committee, 404 separate legal entity, 150 shadow directors, 151 shareholders agreement, 150 liability, 151-2 small business, 249 tortious liability, 154-5

Infrastructure

agreement, 168-9 public private partnerships *see* Public private partnership

Injunction

breach of fiduciary duty, 76, 91 government joint venture default, 391-2 Mareva, 91

Insolvency

considerations for lenders, 260 floating charge, 247 joint venturer, of, 247-8 lender, considerations, 247-8 liquidation of borrower *see* Winding up

Insolvent trading

joint venture company, 151-2 lender, issues to consider, 247-8 liability, 151-2

Insurance, 319-20

annual basis, 296 due diligence, 298, 318 environmental risk, 318 financiers' concerns, 296 non-imputation clause, 297 notices required, 297-8 product liability, 297 public liability, 297 public private partnership, 296-9 renewal, 298 risk management, 298 scope of cover, 297 terrorism cover, 298 uninsurability, 298

Intellectual property research and development programs, assignment into joint venture, 491-2 royalties, 495, 503-4 confidential information, 484-9 termination of joint venture copyright, 476-80 allocation of rights, 507-8 Crown privileges, 507 liquidation, sale on, 508 designs, 480-2 trade marks, 482-4 developed through joint venture, types, 472 497-506 allocation of ownership, 498-500 International joint ventures, 321-5 confidentiality obligations, 504-6 arbitration, 358-61 documentation, 497-506 UNCTRAL Model Law, 358-9 employees and contractors, 506-7 choice of law see Choice of law exploitation, 500-2 contractual, 321-3, 354 government funded research, 500 corporate, 323 joint ownership, 499-500 counter-party selection, 354-6 ownership, 498-500 dispute resolution, 357-63 protection of new technology, 502-3 arbitration, 358-61 royalties, 503-4 bi-lateral investment treaties, 361-3 existing, 489-97 considerations, 357-8 assignment into joint venture, 491-2 due diligence, 354-5 licence into joint venture, 492-6 immunity from suit, 210 exploitation rights, 500-2 lack of uniform definition, 321 exploration or production joint nature of, 354 ventures, 462, 470 structuring, 353-7 joint venture documentation, 489-97 considerations, 354-7 employees and contractors, 506-7 legal complexities, 354 existing intellectual property, 490-6 Joint stock company, 12-14 intellectual property developed, fiduciary relations, 14 497-506 joint venture compared, 14 licensing agreement, 492-6 liability of members, 14 parties, 489 mining partnership compared, 9 warranties and indemnities, 496-7 licence into joint venture, 492-6 Joint venture assignment, right of, 495 agreement see Joint venture agreement challenging validity of registration, anti-competitive see Competition and Consumer Act 2010 (Cth) confidentiality obligations, 494 categories, 150, 457 enforcements of right, 493 commercial enterprise, whether, 30-6 exclusive or non-exclusive, 492 concept of 172 information, obligation to provide, Australia, 4 494 Scotland, 15-16, 25, 34 royalties, 495 United Kingdom, 22-8, 34 sub-license, right of, 495 United States, 16-19, 25 term, 493 contractual foundation, 5 termination, 496 credit, pledging, 159 territorial restrictions, 493 definition, 3-7 licensing agreements with third Competition and Consumer Act 2010 parties, 496 (Cth), 4, 439-40 liquidation of company, sale on, 508-9 international, lack of, 321-2 patents, 473-6 discrete businesses not joint commerprotection generally, 472 cial activity, 30-6 protection of new technology, 502-3 domestic relationships, 4

Joint venture (cont)	lenders' powers, 199-200
equitable content, 37-40	powers of non-defaulting venturers
features, 19-22	204-5
not principal commercial activity of participants, 19	disclosure of information to lenders, 206
regulation by agreement, 19	"entire agreement" clause, 135-7, 138
single project of limited duration,	estoppel see Estoppel
19, 34	features, 19
fiduciary relationship see Fiduciary relationship	fiduciary obligations see Fiduciary obligations
historical precursors, 7-14	foreign participation, 212
incorporated see Incorporated joint	immunity provisions, 210
venture	importance, 187
international see International joint	incompleteness, 1
ventures	lenders, matters concerning, 188-212
mining, 163-4	assignment rights, 189-96
mutual commercial gain, 3, 163	choice of law, 210
negotiation see Joint venture	completion covenants, 205-6, 220
agreement	conditions precedent, 212
obligations of parties see Obligations	confidentiality, 206
of joint venturers	cross-charges, 200-5
Partnership Act, application, 1, 6	default provisions, 196-9
partnership distinguished, 1-7, 15,	fiduciary duties, 207-8
24-30, 159-66	foreign participation, 212
pledging credit, 159	immunity from suit, 210
product-sharing, 32-4	joint venturer's interest, 188-9
profit motive, 3, 40	power of attorney provisions, 211
common undertaking for, 164	pre-emptive rights, 208-10
not fundamental, 3, 29-30	security of tenure , 188
property, 164	negotiation
single transaction, 34-7	confidential information disclosed,
single undertaking, 4, 34-7	486
title to property, 161	estoppel see Estoppel
unincorporated <i>see</i> Joint venture agreement	obligations of parties <i>see</i> Obligations of joint venturers
Joint venture agreement	fiduciary see Fiduciary obligations
adequacy, 1	good faith see Good faith obligation
assignment clause, 191-3	operating committee, provisions re,
charges over interests	402-4
cross-charges, 200-11	"opting out" clause, 134, 138
external financiers, in favour of, 205	partition of assets, 188
priority, 203-5	power of attorney provisions, 211
right to charge, 189-96	pre-emptive rights, 208-10
choice of law clause, 327-9	right to assign and charge interest,
see also Choice of law	189-96
completion covenants, 205-6, 220	security of tenure, 188
conditions precedent, 212	several rather than joint, 29
covenant not to partition, 188	"sole discretion" clause, 133-5, 138
cross-charges, 200-5	defined area of interest, 75
default provisions	fiduciary duties arising from, 75-80
consequences, 196-7	implied by law, 42-3
continuation of venture, 199	title to property, 161, 188
enforcement of procedures 197-8	unconscionability, 121, 123

Joint venture company see Local government Incorporated joint venture capacity to enter joint ventures, 226, 288 Kyoto protocol, 263, 265 ultra vires doctrine, 226 executive necessity, 236-9, 393-4 power to contract, 288 defence to breach of fiduciary duty, procedural requirements, 226 46,85 Macadamia Company and Suncoast Lease Gold Pty Ltd, 465-6 PPS lease, 173-4 Managed investment scheme, 155-7 Letter of comfort, 220-2 see also Unit trust Liability of participants compliance plan, 156 directors, 151-2 constitution, 258-9 indemnity, 152 disclosure, 156 insolvent trading, 151-2 matters for lenders to consider, 257-8 nominee directors, 152 novating securities, 258 shadow directors, 151 registration, 156 incorporated joint venture, 150-5 responsible entity, 156, 257-8 indemnity, 152 Management trustee of unit trust, 158 directors, 151-2 independent contractor, act of, 152 nominee directors, 152 insolvent trading, 151-2 operating committee, 404-5 insurance see Insurance operator/manager, 73-4 joint stock company, 14 joint tortfeasors, 154-5 Manager operator/manager, 152 joint venture, of, 73-4 third parties, to, 15, 154, 158 Mareva order, 91 incorporated joint venture, 154 unincorporated joint venture, 158, Marketing joint ventures 400 - 1ACCC authorisation, 457 unit holders, 158 tort, 154-5 Mergers, 450-1 trustees, for breach of trust, 82 Mining unincorporated joint venture, 158-9, see also Resources joint venture 400 - 1companies, 4, 7-9 unit trust, 158 co-owners, partnership between, 8 unjust enrichment, 395 farm-in agreement, 76 **Licence** see Intellectual property joint ownership of mines, 8 joint venture agreement express undertakings, 64 equitable, 90 partnerships, 3, 163-4 petroleum joint ventures distin-Life insurance company guished, 413 involvement in joint venture, 250 pre-profit making commercial associa-Limited partnerships, 12 tions, 21-2 product-sharing, 32-4 **Liquidation** see Winding up projects, 4 Local authority unincorporated companies, 8 involvement in joint venture, 250 unincorporated joint venture, 2-3, 163-4 power to contract, 250

Misleading or deceptive conduct

letter of comfort, 222

Misrepresentation

breach of fiduciary duty, 76, 82, 208 liability for, 208

Mortgages

instalment contracts, subject to, 218-19 PPSA, under, 171

Mutual agency, 16,26,165

Mutual insurance societies, 11

Mutual trust and confidence, 38, 52

Negligent misstatement

letter of comfort, 222

Non-consent operation *see* Resources joint venture

Obligations of joint venturers

equal division of gains, 40 fiduciary see Fiduciary obligations good faith see Good faith obligation manager or operator of, 73-4 misleading co-venturers, 41 sharing losses, 37-40 use of information, 41

Operating committee, 404-5

Operator

joint venture, of, 73-4 resources joint venture, 407

Pallant v Morgan

equities, 22

Parent companies

letter of comfort, 221-2

value of property in, 378

waiver of right to, 374

Partition

choice of sale or, 377-8
covenant not to, 188
deadlock or impasse resolution, 374-8
management agreements, rights
under, 375
resources joint venture, prohibition,
427
right of, 374-5
statutory trust for, 376-7

Partnership

see also Unincorporated joint venture cross-charging of interests, 159 definition, 58, 162 determining existence of, 26 duties of partners, 24 English law, 13, 22-4, 34 features of, 22-4, 162-3 fiduciary relationship see Fiduciary relationship financing, significance re, 159-62 interests in property, 160-1, 160-1 joint venture distinguished, 1-7, 15, 24-30, 159-66 lien over property, 159 limited, 12 limited venture, 4 mining, 3, 7-9 mutual agency, 16,26,165 mutual confidence, element of, 5 onus of proving existence, 26 Partnership Act 1890 (UK), concept under, 22-8, 34 pledging credit of partners, 159 profit element, 3, 29-30, 160 public private see Public private partnership remedies of partners, 23 rights of partners, 23, 160 security over partnership property, 160-1 single undertaking, 4, 34-7, 163 title to assets, 160-1 unincorporated joint venture see Unincorporated joint venture

Patents, 473-6

see also Intellectual property
employer's rights, 475
exclusive rights conferred by, 473
innovation, 473
joint application, 475-6
methods and processes, 473, 476
Patent Office, 473
patentable inventions, 473
pre-assignment clause in employment
contract, 475
royalties, 476
standard, 473
term, 474-5

Personal property

see also Personal Property Securities Act 2009 (Cth)

assignment, joint venturer's rights, Howard Smith Industries Pty Ltd and 195-6 Adelaide Steamship Industries Pty Ltd. 461 owner, protection of interest, 172 joint venture a cloak for, 450 PPSA. personal property under, 170-1 Part IV of CCA, application, 450 security interests under, 171-2 **Priority** project cash flows, security over, PPSA regime, 172, 176, 182-3 212-18 Production joint ventures, 453 Personal Property Securities Act 2009 ACCC authorisation, 454, 458-60 (Cth) (PPSA) intellectual property see Intellectual application, 170 property assignment, joint venturer's rights, 195-6 **Profit** bailment, PPSA, 173-4 joint venture, 3, 36, 163-4 circulating assets, 177-8, 185-6 not fundamental, 3, 29-30 circulating security interest, 178, 180 presumption of equal share, 40, 65 commencement, 170 sharing of, 36, 39-40 lease, PPSA, 173-4 partnership element, 3, 29-30, 163-4 operation, 175 secret, 207 perfection, 175, 248 Project cash flows personal property under, 170-1 security over, 212-18 priority regime, 172, 176 PPSA, application, 213-18 project cash flows, security over, 212-18 Project infrastructure agreement, purchase money security interests 168-9 (PMSIs), 174 Property joint ventures, 164-5 registration, 172 security interests under, 171 Public company cross charges, 171 related-party transactions, 219-220 deemed, 173 finance leases, 171 Public private partnership fixed and floating charges, 171, assessment of project, 284-5 177 - 9financial analysis, 285 mining and petroleum titles, 186 objectives, 285 mortgages, 171 risk analysis, 285 perfection of, 175-6 assignment restrictions, 314 project assets, other, 186 Australian policies, 281-8, 307 retention of title terms, 171-2 availability, concept of, 309-11 transitional provisions, 176 change in services, 311-12 changes in law, 313 Petroleum see Resources joint venture competitive funding, need for, 307-9 Power of attorney damage and reinstatement, 295-6 direct agreements, 304-5 joint venture agreement provisions, dispute resolution, 306-7 features of Australian, 283-4 winding up, effect, 245-6 financier requirements, 314 Pre-profit making commercial financing documentation, 315 association, 21-2 due diligence, 315 force majeure, 293-5 Price fixing termination due to, 294 see also Competition and Consumer government parties Act 2010 (Cth) (Cth) guarantees, 288-9

Public private partnership (cont)	project company default, 299, 302-4
government parties (cont)	transfer of assets, 300
power to contract, 288	tripartite agreements, 304-5
ranking of securities, 289-90	Purchase money security interests
set-off rights, 311	(PMSIs), 174
step-in rights, 290-3	
Infrastructure Australia, 281-2	Rescission, 91
Guidelines, 282	Related-party transactions, 219-20
insurance, 296-9	Related party transactions, 217 20
due diligence, 298 non-imputation clause, 297	Relief against forfeiture, 382-7
notices required, 297-8	Relief against penalty, 387-90
public/product liability, 297	Remedies
renewal, 298	
risk management, 298	equitable, 89-92 third parties, against, 91-2
scope of cover, 297	tilitu parties, agailist, 31-2
terrorism cover, 298	Research and development joint
uninsurability, 298-9	ventures
land acquisition and tenure, 316-17	ACCC authorisation, 457
obligations, subcontracting out, 313-14	intellectual property see Intellectual
performance, concept of, 309-11 phases of, 285-7	property
contract management, 286-7	Resources joint venture
negotiation and completion, 286	see also Unincorporated joint venture
project development, 286	assignment of interests, 420-9
request for proposal, 286	change of ownership or control,
Private Finance Initiative (UK), 280,	427-8
307-8	consent of co-venturers, 425
PFI transaction structures, 280-1	minimum interests, 425
procurement of services, 309-11	part of interest, 420
procurement strategy, 285	partition, prohibition, 427
project assessment, 284-5	pre-emptive rights, 420-9, 426
refinancing of projects, 305-6	restraints on alienation, prohibition,
risk allocation, 287-8	423
service charge variations, 312-13	restrictions on offers, 423-4
set-off rights, 311	rule against perpetuities, 422
step-in and cure rights, 290-3	choice of structure, 398-9
contractor breach, 292	costs factors, 398-400
financers, 292-3	deadlock, 407-19
government, 290-2	deemed approval provisions, 409
no project company breach, 291	drag and tag along rights, 428-9
subcontracting out of obligations, 313-14	escalation mechanisms, 410
taxation issues, 317-18	mandatory transfers, 411 minimum work specifications, 409
tender process risks, 315	non-consent provisions, 412-19
termination, 299-300	provisions in agreement, 408
compensation, 300-4	quick resolution, need for, 408
contractor default, 303	referral to third party, 410
early, 300	'Russian roulette' mechanism, 411
expiry of service period, 299	silence on provisions for, 409
force majeure, 299	sole risk provisions, 409, 412-19
government default, 299-301	withdrawal, 419
no compensation model, 304	decision making, 403-7

default remedies, 429-37 compulsory sale of interest, 411 cross-charge, enforcement of, 434-5 dilution of interest, 433-4 forfeiture of interest, 431-3 loss of rights to product or proceeds of sale, 434-5 parent company guarantees, 436 staged remedies, 436-7 documenting, complexity, 401-3 short-form arrangements, 402 drag and tag along rights, 428-9 exploration joint venture, 457	evaluation, 147-9 market risk, 148 operating risk, 148 political risk, 149 public private partnerships risk allocation guide, 287-8 tender process risks, 315 resource risk, 148 Sagasco Resources Limited, 466 Sales contract, 189 assignment of rights under, 212-18 instalment contract
ACCC authorisation, 457 liability of participants, 401 non-consent operation, 412, 418-19 restrictions, 413-15	mortgage of land subject to, 218-19 Scotland joint ventures, 15-16
operating committee, 404-5 operator, 407 partnership, avoiding treatment as, 400	Security cash flows, over, 212-18
passing resolutions, 405 petroleum and mining distinguished, 413 pro-emptive rights, 420,27	charges over assets, 186-7 cross-charges see Cross-charges deeds, 187 documentation, 187
pre-emptive rights, 420-27 interpretation, 426 risk factors, 399-400 security interests, registration, 209	finance agreement, 187 fixed and floating charges, 177-85 project cash flows, over, 212-18 future property, charge over, 187
short-form arrangements, 402 sole risk operation, 412-19 appraisal drilling, 416-17 development drilling, 417	joint venture agreement provisions, 187-212 land, over, 186
exploration drilling, 415-16 infrastructure construction or expansion, 417	instalment contracts, subject to, 218-19 mortgage, 218 mining titles, 186
management, 417-18 restrictions, 413-15 seismic surveys, 415 specification of objects, 404	nature of, 169 personal property, over <i>see</i> Personal property
unincorporated joint ventures, 400-1 withdrawal provisions, 419	plant and equipment, 187 priority of charges, 202-3, 248-9 cross-charges, 202-3
Restitution government joint venture default, 395-6	project cash flows, over, 212-18 registration of charges, 248-9 cross-charges, 202-3
Retention of title terms PPSA, under, 171-2	Share farming, 11 product-sharing, 32-4
Risk	Shipping ventures, 10
analysis, Australian PPP model, 285 choice of finance structure, 147-50	Societe en commandite, 12
completion risk, 148 currency risk, 148	Sole risk operation <i>see</i> Resources joint venture

Sovereign risk, 240-1

Specific performance, 390-1

right to assign interest, 189

State agreements, 241-2 contract, power to, 225 major resource projects, 241-2 matters for lenders to consider, 241 ratification by legislation, 242

Statutory corporation

see also Government owned corporations involvement in joint venture, 251 power to contract, 225-6, 288

Superannuation fund

financing joint ventures, 143 trustee, involvement in joint venture, 250

Syndicates, 11

Taxation issues

foreign participation, 251 public private partnership, 317-18

Termination of joint venture

good faith obligation, 128-9 intellectual property allocation of rights, 507-8 liquidation, sale on, 508 notice 128

Territories

contract, power to, 225

Third parties

remedies against, 91-2 knowledge, categories of, 92

Tolling company, 20

Tortious liability

corporate veil, 152-4 incorporated joint ventures, 154-5

Trade marks, 482-4

see also Intellectual property

Trade Practices Act 1974 (Cth)

see Competition and Consumer Act 2010 (Cth) unconscionable conduct, 121

Trade secrets, 484-9

see also Intellectual property

Trust

see also Unit trust creditors' access to trust assets secured creditors, 256 unsecured creditors, 256-7 joint venture in form of, 255-9 personal liability trustee, 255 powers and duties of trustee, 255 protection for lenders, 257 warranties by trustee, 257

Ultra vires doctrine

capacity to contract, 226

Unclean hands

defence to breach of fiduciary duty, 85

Unconscionability

Australian Consumer Law, 121-4 concept of, 2, 118-19 equitable doctrine, 119-21 exercise of legal right, 199-200 formation of contract, 121, 123 franchisor, 123 good faith obligation and, 109, 119-124 lack of good faith, 118 meaning, 119 onus of proof, 120 special disadvantage, 121 statutory, 121-4 unreasonableness, 118

Unincorporated joint venture, 2-3,

158-9 advantages, 159 assets ownership and disposal, 165 tenants in common, 165 classes, 159 contractual, 158 disadvantages, 159 documentation, 158 fiduciary obligations see Fiduciary obligations interests in property, 158 liability of participants, 159 mining, 3 operating committee, 404-5 ownership of assets, 158-9, 165 partnership, 3, 159, 165 see also Partnership resources see Resources joint venture rights and liabilities of participants, 158-9 separate legal identity, lack of, 158

Unit trust, 154-5

advantages, 155-6
collective investment scheme, 155
directors of trustee companies, 158
disadvantages, 158
documentation, 158
equity finance, 146
legislation governing, 156
liability of unit-holders, 158
managed investment scheme, 156-7, 257-60
nature of, 155
public trading trust, 156-7
trustee, 155
rights against beneficiaries, 158

United States

choice of law absence of, 337-8 Restatement Second, 324, 326, 330, 337-8, 339-46 concept of joint venture, 16-19

Unjust enrichment

government joint venture default, 395-6

Winding up

borrower, of, 244-7 custody of charged assets, 245 disposal of project property, 244 intellectual property, sale of, 508-9 lenders, effect on, 244-7 letter of comfort, 222 personal liability of receiver, 246 power of attorney not revoked, 245-6 receiver's powers, 244-5