CHAPTER 9: JOINT VENTURES AND DUAL LISTED COMPANIES

Background

Joint ventures

A joint venture is an association of persons formed for the purpose of pursuing a particular business objective together. It involves a level of integration between the participants which is less than would amount to a merger. The term 'joint venture' does not have a settled common law meaning in Australia,[1] reflecting the fact that joint ventures can take various forms. A joint venture may be undertaken through a partnership or some other form of unincorporated association or through an incorporated body. A joint venture is usually undertaken to pursue a single project and is often intended to last for a limited period. The relationship between the participants in a joint venture is usually governed by a joint venture agreement.

Section 4J of the Act defines a joint venture widely as:

> '… an activity in trade or commerce: … (i) carried on jointly by two or more persons, whether or not in partnership; or (ii) 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 …'

Section 45A(2) provides an exemption for joint ventures from the per se prohibition against price fixing under section 45A of the Act, but they remain subject to the substantial lessening of competition test under sections 45(2)(a)(ii) and (2)(b)(ii). The exemption extends, however, to a limited range of conduct. Section 45A(2) provides:

> 'Subsection (1) does not apply to a provision of a contract or arrangement made or of an understanding arrived at, or of a proposed contract of arrangement to be made or of a proposed understanding to be arrived at, for the purposes of a joint venture to the extent that the provision relates or would relate to:

1 *United Dominions Corporations Limited v. Brian Pty Ltd* (1985) Vol. 157 Commonwealth Law Reports, p. 1 at p. 10.

(a) the joint supply by 2 or more of the parties to the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by all the parties in pursuance of the joint venture;

(b) the joint supply by 2 or more of the parties to the joint venture of services in pursuance of the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture of services in pursuance of, and made available as a result of, the joint venture; or

(c) in the case of a joint venture carried on by a body corporate as mentioned in subparagraph 4J(a)(ii):

(i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or

(ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by:

(A) a person who is the owner of shares in the capital of the body corporate; or

(B) a body corporate that is related to such a person.'

A joint venture agreement may thus be in breach of the prohibition under section 45 against arrangements, including price fixing, which have the purpose, effect or likely effect of substantially lessening competition, although the prohibition will not be per se in the case of price fixing arrangements falling within section 45A(2). It would be common for joint venture agreements to contain pricing arrangements between the parties to the joint venture. The parties to a joint venture may also be in breach of the per se prohibition against exclusionary provisions under sections 45(2)(a)(i) and (2)(b)(i) of the Act.

Parties seeking to establish a joint venture may seek authorisation under section 88(1) of the Act for price fixing arrangements or exclusionary provisions. If the public benefits flowing from the joint venture outweigh the anti-competitive detriment, or, in the case of an exclusionary provision, the public benefit is such that it should be allowed, the joint venture will be authorised pursuant to section 90 of the Act.

Dual listed companies

A DLC may operate in a fashion similar to that of a body produced through a merger or a highly integrated joint venture. Whilst this form of corporate structure is yet to be recognised in Australian legislation, the financial reporting requirements for three DLCs have been modified by the Australian Securities and Investments Commission (ASIC) pursuant to section 340 of the Commonwealth *Corporations Act 2001* to allow them to produce consolidated accounts.[2] These DLCs are Rio Tinto Limited, BHP Billiton Limited and Brambles Industries Limited.

In general, a DLC involves two corporations, one listed on a domestic stock exchange and the other listed on a foreign stock exchange, contracting to operate their businesses as a unified enterprise and sharing the attendant risks and rewards. Each corporation maintains its separate legal status and assets are generally only transferred between the two corporations for fair value. The shareholdings of each corporation remain unchanged, but shareholders vote on the resolutions of both corporations as if they were a single group. The boards of the two corporations have common directors, although those directors are appointed separately to each corporation. 'Equalised' dividends are declared for the DLC.

A DLC may be formed without any acquisition of shares or assets taking place, so that its formation may not be subject to the merger provisions of the Act. The contractual arrangements entered into by the two companies in forming and running the DLC could, however, be in breach of section 45. This is in contrast to agreements between related companies within the same corporate group, which are exempt from the prohibition imposed by section 45 against arrangements that have the purpose, effect or likely effect of substantially lessening competition.[3]

As with joint ventures, an agreement establishing a DLC may contain price fixing provisions and other provisions that have the effect of substantially lessening competition in contravention of, respectively, section 45A and section 45. The parties seeking to establish a DLC may seek authorisation under section 88(1), or section 88(9) if the arrangement involves the acquisition of assets. If the public benefits flowing from the formation of the DLC

2 ASIC 2001, *Practice Note 71: Financial reporting by Australian entities in dual-listed company arrangements*.

3 See section 45(8) of the Act.

outweigh any anti-competitive detriment it will be authorised pursuant to section 90.

Issues

The current exemption for joint ventures provided by section 45A(2) appears to afford a degree of certainty to participants in some mining and manufacturing joint ventures. Where such joint ventures are not likely to substantially lessen competition, they can be carried on with some confidence that any pricing decisions by the participants in relation to output are exempted from the per se price fixing prohibition and do not otherwise fall foul of section 45.

There are, however, some concerns that the exemption does not provide for existing practices in mining and manufacturing joint ventures. In particular, some submissions suggest that the exemption does not extend to the joint marketing of output produced by a separately constituted mineral exploration, development and production joint venture.

In addition, in some submissions it is argued that the existing joint venture exemption is too restrictive, and is framed too narrowly, to benefit the 'looser' collaborative arrangements that are now more common in areas of recent innovative growth. This is said to be particularly important in 'network joint ventures' in the areas of both financial services and communications.

Two proposals were put to the Committee to address these concerns. The first is a proposal for a statutory defence, similar to that found in section 29(1A) of the New Zealand *Commerce Act 1986*. The proposed provision is as follows:

> 'Subsection 45A(1) does not apply to a provision of a contract or arrangement made or of an understanding arrived at, or of a proposed contract or arrangement to be made or of a proposed understanding to be arrived at, to the extent that the provision facilitates and is for the purposes of a joint venture that does not have the purpose, effect or likely effect of substantially lessening competition.'

The second proposal is for a parallel exemption from both the per se exclusionary provisions found in sections 45(2)(a)(i) and (2)(b)(i) and the per se price fixing provisions:

> 'Section 45(2)(a)(i) and section 45(2)(b)(i) and section 45A do not apply to conduct undertaken in connection with the formation or operation, or proposed formation or operation, of a joint venture if the joint venture is not or is unlikely to prevent or

lessen competition except to the extent reasonably required to undertake or facilitate the formation or operation of the joint venture.'

Finally, it was submitted that the ACCC should be required to issue guidelines outlining the treatment of joint ventures under the Act to provide business with a greater understanding of the ACCC's approach.

As DLCs are not considered a single economic entity for the purpose of section 45, an agreement entered into by the two companies to form and run the DLC may be in breach of section 45. This situation may be contrasted with the exemption for all intra-group transactions between related companies in a corporate group. While those proposing a DLC may seek authorisation under Part VII of the Act, this option is not favoured in the submissions made to the Committee.

International context

European Union

The European Commission considers 'non-full function' joint ventures[4] under the prohibition of anti-competitive agreements in Article 81(1) of the European Community Treaty.

Block exemptions from Article 81(1) have been established under Article 81(3) covering, for example, research and development joint ventures, 'specialisation' (covering joint production and related exclusive purchasing or supply obligations), technology transfer and vertical agreements. A joint venture can lose the protection offered by the block exemption where the European Commission is of the view that the joint venture is failing, without objective explanation, to produce the desired results or where there is a lack of effective competition in a relevant market.

Where a joint venture is unable to benefit from one of the block exemptions, the venture proponents may seek an individual exemption under Article 81(3). The European Commission may grant the exemption, subject to conditions, if the economic and other benefits flowing from the venture outweigh the detriment flowing from reduced competition in the relevant market.

4 A full function joint venture is one that performs, on a lasting basis, all the functions of an autonomous economic entity. Joint ventures of this type are considered under the merger regulations.

United Kingdom

In the United Kingdom, if, as a result of a joint venture, the venture's parents are deemed to 'cease to be distinct' the venture will be considered under the new merger provisions in the *Enterprise Act 2002*. Under that Act, if the Office of Fair Trading is satisfied that there is sufficient 'relevant customer benefit' to outweigh any substantial lessening of competition, the venture will be allowed to proceed.

Other joint ventures may be considered under the United Kingdom's *Competition Act 1998*. Under that Act, the prohibition of anti-competitive agreements is in terms identical to that found in Article 81(1) of the European Community Treaty. Similarly, block exemptions granted under the Treaty can be incorporated into United Kingdom law, to complement the exemptions that may otherwise be granted under the *Competition Act 1998*.[5]

United States

Section 1 of the *Sherman Act 1890* says that every 'contract, combination … or conspiracy, in restraint of trade or commerce … is declared to be illegal'. The United States Supreme Court has decided that agreements to fix prices are so likely to damage competition, and have such little pro-competitive benefit, that they should be prosecuted as per se illegal. Such agreements do not warrant the time required for an extensive 'rule of reason' inquiry into their impact on competition.[6]

There is, however, effectively an exemption from this per se treatment for joint ventures. Agreements may be examined under a rule of reason test if they are 'reasonably related to, and reasonably necessary to achieve pro-competitive benefits from, an efficiency-enhancing integration of economic activity.'[7] The United States Congress has also provided that certain contracts established to carry out a range of research and development and production joint ventures can only be examined under the rule of reason.[8]

Under a rule of reason analysis, if the nature of the agreement and the absence of market power demonstrate an absence of anti-competitive harm then no

5 See Office of Fair Trading, *The Competition Act 1998: The Chapter 1 Prohibition*, OFT401.
6 See *Federal Trade Commission v. Superior Court Trial Lawyers Association* (1990) Vol. 493 United States Supreme Court Reports, p. 411 at pp. 432-36.
7 Federal Trade Commission and Department of Justice 2000, *Antitrust guidelines for collaborations among competitors*, p. 4.
8 See the *National Cooperative Research and Production Act 1993* (United States).

further analysis is undertaken. Alternatively, if there is no evidence of overriding offsetting benefits and anti-competitive detriment is evident then the collaboration may be challenged without further analysis.

Where further investigation is warranted, the relevant markets are defined, market share and concentration considered, and the specific features of the agreement analysed. This process provides an understanding of the extent and depth of risk to competition. The next consideration is whether the agreement causing such harm is reasonably necessary to achieve the 'cognizable efficiencies' flowing from the collaboration. Those 'cognizable efficiencies' must be verifiable and potentially pro-competitive, they must be reasonably necessary and they must not be used where there are less restrictive alternatives to achieving substantially the same end.

If, at the completion of the rule of reason analysis, the agreements are deemed reasonably necessary to produce the 'cognizable efficiencies' flowing from the collaboration, any challenge to the agreement will be withdrawn.

Canada

It is an offence under section 45 of the Canadian *Competition Act 1985* to conspire, combine, agree or arrange with another to unduly restrain or injure competition. However, activities commonly associated with joint ventures are excepted from the prohibition, including cooperation in research and development, exchanging statistics, defining product standards, establishing environmental protection measures and solely export oriented ventures. In addition, specialization agreements between corporations that result in production efficiencies can be registered, protecting such arrangements from prosecution under section 45 or the (civil) prohibition of exclusive dealing that substantially lessens competition.

Research and development joint ventures escape scrutiny under the merger laws only if they: are not structured as corporations; are project specific; would generally not have taken place without the venture; do not result in any change in control over a venture parent; are established by written agreement; and do not substantially lessen competition any more than is reasonably necessary.[9]

9 Section 95 of the *Competition Act 1985* (Canada).

Analysis

Joint ventures

Joint ventures may be pro-competitive, particularly when they are employed as a means of developing new products or services or producing existing products or services more efficiently. However, a joint venture may have anti-competitive aspects. A joint venture may prevent competition between the joint venture and one or more of its participants or between the participants themselves. The co-operation necessary to make a joint venture work may spread into other areas of the venture participants' businesses, leading to direct collusion on prices.

The public benefits of a joint venture may outweigh the detriment constituted by any lessening of competition. This is particularly the case where, but for the joint venture, an activity would not have taken place at all. Joint ventures may provide a means of producing efficient economic outcomes where they are able, for example, to achieve economies of scale or scope. These gains may occur in such areas as the exploration for minerals or the extraction and processing of minerals or share farming where the venture partners pool their skill, knowledge and assets. Gains in efficiency also accrue from the use of joint ventures in the financial services sector, particularly in relation to payment systems. Where these gains are at the expense of competition, it is open to the participants to seek authorisation of the joint venture.

It was submitted that the exemption from section 45A(1) of certain agreements for the purposes of joint ventures was too narrow. This exemption, it was said, was introduced into the Act in recognition of the potential pro-competitive benefits of joint ventures and with the intention of avoiding competition laws that unduly restrict the activities of joint ventures. At the same time, it was recognised that it was necessary to guard against joint venture agreements designed as a cover for anti-competitive arrangements. The Swanson Committee, in recommending the introduction of a means of exempting legitimate joint ventures from the section 45A(1) prohibition, expressed the view that it:[10]

> '… would not wish the law to frustrate the formation of joint ventures which provide the ability to embark on a project of development which may be desirable in the public interest and which would not otherwise be undertaken.'

10 Committee to Review the Trade Practices Act 1974 (1976), *Report to the Minister for Business and Consumer Affairs*, Commonwealth of Australia, Canberra, p. 26.

It was pointed out in submissions made to the Committee that the kind of joint ventures that the Swanson Committee had in mind involved the pooling of resources by the participants to produce and supply a product jointly. Accordingly, the exception made by section 45A(2) is available only to that type of joint venture. In the current economy, particularly in areas of innovative growth such as e-commerce, there are joint ventures that do not involve the pooling of resources for the joint production or supply of a product. These may not derive any advantage from section 45A(2). It was said by way of example that it is unclear whether the exception would apply where production joint venturers take product separately, but sell product jointly through a marketing joint venture or marketing company.

The Committee accepts that the exemption in section 45A(2) may operate too narrowly to fully achieve its object, but is conscious of the fact that the definition of joint venture in section 4J of the Act is wide enough to extend to practically any joint activity in trade or commerce. It would be difficult to suggest a more restricted definition having regard to the many kinds of joint venture that are evolving. However, a blanket exemption from section 45A(1) for joint venture agreements as currently defined would be too wide and be likely to exempt price fixing conduct that ought to be prohibited per se. On the other hand, the current section 45A(2) is unduly prescriptive.

The Committee believes that the problem could be overcome by substituting for section 45A(2) a provision similar to that suggested to the effect that:

> 'Section 45A(1) does not apply to a provision of a contract or arrangement made, or of an understanding arrived at, or of a proposed contract or arrangement to be made, or of a proposed understanding to be arrived at, if it is proved that the provision is for the purposes of a joint venture and the joint venture does not have the purpose, effect or likely effect of substantially lessening competition.'

Such a provision would provide a statutory defence for joint ventures against the per se prohibition of price fixing, which would operate in much the same way as the provision which is recommended as a statutory defence against the per se prohibition of exclusionary provisions. Again, the reversal of the onus of proof would be justified by the prima facie illegality of price fixing arrangements. It merely requires a party seeking to take advantage of an exception to bring itself within it. Of course, the effect of the statutory defence would be to remove, in the case of competitive joint ventures, the per se prohibition imposed by section 45A(1), but not the prohibition under section 45 of arrangements having the purpose, effect or likely effect of substantially lessening competition. Where there was any uncertainty, authorisation would remain available.

At the same time as the Committee recommends in Chapter 8 that the Act be amended to introduce a statutory defence in relation to an exclusionary provision, it also recommends that the Act be amended to restrict the persons or classes of persons to which a prohibited exclusionary provision relates to a competitor, actual or potential, of one or more of the parties to the exclusionary provision. The Committee believes that these recommendations, if adopted, should meet the concerns expressed about the effect upon joint ventures of the current prohibition per se of exclusionary provisions as defined by section 4D of the Act.

The Committee accepts the submission that the ACCC should develop and issue guidelines outlining its approach to joint ventures. Guidelines would, the Committee believes, assist both the ACCC and business in achieving the object of the Act in relation to a constantly changing area of trade and commerce.

Dual listed companies

It was submitted that transactions between the different legal entities in a DLC should be treated as internal transactions within a single economic entity for the purposes of the Act. Transactions between the entities in a dual listed company are said to be analogous to transactions between related bodies corporate in a corporate group.

The Committee accepts that it would be appropriate, as proposed by the ACCC, to treat intra-party transactions in a DLC as the equivalent of related party transactions within a group of companies. A related party transaction is exempted from sections 45 and 47 by virtue of subsections 45(8) and 47(12), respectively. Section 4A of the Act deems certain bodies corporate to be related to one another. There would need to be a definition, perhaps in that section, of a DLC.

Of course, if DLCs are treated like a corporate group for the purposes of sections 45 and 47, the aggregate power of the economic entity should also be recognised in assessing market power for the purposes of the other provisions in Part IV. This would mean that, in the case of section 46, a DLC should be treated equivalently to corporate groups. Similarly, when considering the impact of vertical anti-competitive conduct, the conduct of the entire economic entity needs to be taken into account. This currently occurs with corporate groups and should also be the case with DLCs.

Finally, whilst the formation of a DLC may escape scrutiny under section 50(1) because it does not involve the acquisition of assets or shares, the assessment of an acquisition by an entity that forms part of the DLC must take into

account the entire market share of the DLC. Whilst this concern may already be covered because section 50(1) applies to an 'indirect' acquisition by a corporation, an appropriate amendment would help to clarify the position.

Conclusions

- Joint ventures make an important contribution to the economy. However, they may involve agreements between the participants in the venture about the price of the goods or services made available as a result of the joint venture. Consequently, a provision in a joint venture agreement with respect to prices should not be prohibited per se where the joint venture does not have the effect or likely effect of substantially lessening competition.

- The current exemption for joint ventures may not accommodate newer kinds of joint ventures that involve alliances between corporations. These newer joint ventures may fall outside the existing exemption because they include agreed action by joint venture partners, but may not involve the joint production of goods or services. Failing a tighter definition of joint venture than that currently provided by section 4J of the Act, a competition defence to the per se prohibition should be substituted for section 45A(2). The authorisation process already provides a means of avoiding the per se prohibition.

- It is desirable that transactions between the corporate entities in a DLC be treated as internal transactions within a single economic entity for the purposes of the Act. It is also desirable that a DLC should be treated as a single entity in market power for other purposes under the Act.

Recommendations

9.1 The Act should be amended by substituting for the current exemption from section 45A(1) provided by section 45A(2), a provision that section 45A(1) does not apply to a provision of a contract or arrangement made, or of an understanding arrived at, or of a proposed contract or arrangement to be made, or of a proposed understanding to be arrived at, if it is proved that the provision is for the purposes of a joint venture and the joint venture does not have the purpose, effect or likely effect of substantially lessening competition.

9.2 The ACCC should develop and issue guidelines outlining its approach to joint ventures.

9.3 The Act should be amended to allow intra-party transactions in a DLC to be treated on the same basis as related party transactions within a group of companies. Consistently with this, the aggregate size of the DLC should be recognised for the purposes of assessing market power.