SUPREME COURT OF QUEENSLAND

CITATION:	*AMCI (IO) P/L & Anor v Aquila Steel P/L* and *AMCI (BC) P/L v Belcoal P/L* [2007] QSC 238
PARTIES:	**AMCI (IO) PTY LTD** (ACN 123 253 485) (first plaintiff) **WESTIRON PTY LTD** (ACN 112 157 427) (second plaintiff) **v** **AQUILA STEEL PTY LTD** (ACN 097 803 613) (defendant) **AMCI (BC) PTY LTD** (ACN 124 113 873) (first plaintiff) **BELCOAL PTY LTD** (ACN 112 863 180) (second plaintiff) v **BD COAL PTY LTD** (ACN 113 623 439) (first defendant) **AQUILA RESOURCES LIMITED** (ACN 092 002 769) (second defendant) **AMCI HOLDINGS AUSTRALIA PTY LTD** (ACN 075 176 386) (third defendant) **RIO DOCE AUSTRALIA PTY LTD** (ACN 112 797 403) (fourth defendant) **CVRD INTERNATIONAL SA** (Formerly Itabira Rio Doce Company Limited) (fifth defendant)
FILE NO/S:	Supreme Court No. 3468 of 2007 Supreme Court No. 3469 of 2007
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 September 2007
DELIVERED AT:	Brisbane
HEARING DATE:	16 and 17 August 2007
JUDGE:	Muir J
ORDER:	**1. In each of 3468/07 and 3469/07 there will be declarations in terms of paragraphs 1 and 2 of the prayer for relief in the Statement of Claim.**

2. **It will be ordered that in 3468/07 the defendants pay the plaintiffs' costs of and incidental to the proceedings including reserved costs, if any. In 3469/07 it will be ordered that the first and second defendants pay the plaintiffs' and the other defendants' costs of and incidental to the proceedings including reserved costs, if any.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where defendant and second plaintiff in first matter entered into joint venture agreement for mining purposes – where first defendant and second plaintiff in second matter entered into a relevantly identical joint venture agreement – where agreement contained a clause allowing one party to exercise an option if a "change in control" occurred – where shares in second plaintiffs were transferred in connection with other changes in group shareholding– where defendants claim right to exercise option – whether 'change in control' had occurred – meaning of 'change in control' – whether shares could be beneficially held only upon registration

Corporations Act 2001, s 46, 49, 50 and 50AA

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99, cited
Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353, cited
Dalgety Downs Pastoral Co Pty Ltd v Federal Commissioner of Taxation (1952) 85 CLR 335, cited
Federal Commissioner of Taxation v Patcorp Investments Ltd (1973) 140 CLR 247, applied
Frankcombe v Foster Investments Pty Ltd [1978] 2 NSWLR 41, applied
Hillas and Co Ltd v Arcos Ltd (1932) 147 LT 503, applied
Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) [2004] 1 AC 715, applied
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, cited
Kingston v Keprose Pty Ltd (No. 3) (1987) 11 NSWLR 404, cited
Maggbury Pty Ltd v Hafele Australia Pty Ltd (2001) 210 CLR 181, applied
McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579, applied
Musselwhite v C H Musselwhite & Sons Ltd (1962) Ch 964, cited

Pauls Trading Pty Ltd v Norco Cooperative Ltd (2006) 24 ACLC 347, cited
Re Fernlake Pty Ltd [1995] 1 Qd R 597, cited
Rivkin Financial Services Ltd v Sofcom Ltd (2004) 51 ACSR 486, cited
Shaw v Foster (1872) LR 5 HL 321, cited
Sirius International Insurance Co Ltd v FAI General Insurance [2004] 1 WLR 3251, cited
Toll (FBCT) Pty Limited v Alphapharm Pty Ltd (2004) 219 CLR 165, applied
Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd (1968) 118 CLR 429, applied

COUNSEL: W Sofronoff QC with him A M Pomerenke for the plaintiffs in 3468/2007 and 3469/2007
D J S Jackson with him B Dharmananda for the defendant in 3468/2007 and the first and second defendants in 3469/2007
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SOLICITORS: Allens Arthur Robinson for the plaintiffs in 3468/2007 and 3469/2007
Mallesons Stephen Jaques for the defendant in 3468/2007 and the first and second defendants in 3469/2007
McCullough Robinson as town agents for Baker & McKenzie for the third, fourth and fifth defendants in 3469/2007

Introduction

[1] The central question for determination in proceedings 3468/2007 and 3469/2007 is whether in circumstances which are substantially undisputed there has been a change in control of a joint venture participant such that the other participant in the joint venture has acquired an option to purchase the interest of the first mentioned participant by operation of clause 14.5 of the Joint Venture Agreement.

[2] Proceedings 3468/2007 concern a joint venture agreement dated 14 February 2005 originally entered into between the defendant Aquila Steel Pty Ltd and the second plaintiff Westiron Pty Ltd for the purposes of exploring for minerals, undertaking feasibility studies and, depending on viability, conducting mining operations. The joint venture constituted by that agreement is known as the "Premium Iron Ore Joint Venture".

[3] The agreement the subject of action 3469/2007 is dated 7 April 2005 and was entered into between the first defendant in those proceedings, BD Coal Pty Ltd, and the second plaintiff, Belcoal Pty Ltd, for the purpose of mineral exploration and, depending on viability, the carrying out of mine development and coal mining operations. The joint venture constituted by this agreement is called the "Belvedere Joint Venture". Both joint venture agreements are relevantly identical. Also the

transactions and events relied on by the plaintiffs and the Aquila defendants to establish their respective cases in relation to the Premium Iron Ore Joint Venture, except in one respect which will be identified later, are relevantly identical to those relied on in respect of the Belvedere Joint Venture. Accordingly, findings in respect of the former joint venture will determine the outcome of the dispute in respect of the latter, unless the one point of factual divergence affects the outcome in 3648/2007.

[4] Westiron and Belcoal, at the dates on which they entered into their respective joint venture agreements, were companies in a group, the ultimate holding company of which was a Swiss company AMCI International AG. All of the shares in Belcoal were held by AMCI (BP) Pty Ltd and all of the shares in Westiron were held by WA Resources Pty Ltd. Both WA Resources and AMCI (BP) were wholly owned subsidiaries of AMCI Holdings Australia Pty Ltd which, in turn, was a wholly owned subsidiary of AMCI Investments Pty Ltd.

[5] On 27 July 2006 AMCI (WA) Pty Ltd ("WA") was incorporated as a wholly owned subsidiary of Investments. On 22 December 2006, AMCI (IO) Pty Ltd ("IO") was incorporated as a wholly owned subsidiary of Westiron. The relevant group structure as it then existed is shown in figure 2 which is to be found in a group of diagrams comprising the first schedule to these reasons.

[6] Westiron transferred its interest in the Premium Iron Joint Venture to IO pursuant to an agreement made on 26 February 2007. Immediately prior to this transfer Westiron transferred all the shares in IO to WA which was a wholly owned subsidiary of Investments. On 29 March 2007 AMCI Holdings transferred all of the shares held by it in WA Resources to WA. These transactions and other dealings in shares within the AMCI group are alleged to have triggered Aquila's rights under clause 14.5 of the premium iron ore joint venture. Also on 26 February 2007 Belcoal transferred its interest in the Belvedere joint venture to AMCI (BC) Pty Ltd. That transaction and other dealings in shares within the AMCI group are alleged to have triggered Aquila's rights under clause 14.5 of the Belvedere Joint Venture.

The circumstances surrounding the transfer of Westiron's joint venture interest to IO

[7] Figure 1 shows the relevant structure of the AMCI group as at 14 February 2005.

[8] On 26 February 2007, Westiron transferred all of the shares it owned in IO to WA, such that IO became a wholly owned subsidiary of WA. At least this is the plaintiff's contention. Aquila argues that the transfer did not take effect for relevant purposes until after IO acquired Westiron's interest in the Premium Iron Ore Joint Venture. That issue is explored in detail later.

[9] Prior to 3:25pm on 26 February 2007, a share transfer form in respect of 10 fully paid ordinary shares in IO was executed by Westiron as transferor and WA as transferee.

[10] At 3:25pm on 26 February 2007, a resolution was made by the sole director of IO:

(a) which recorded the fact that the executed transfer referred to in the preceding paragraph had been received;

(b) to the effect that, inter alia:

(i) the transfer be registered and the company's register of members be updated accordingly;

(ii) a new share certificate be issued to WA.

[11] After 3:25pm on 26 February 2007, WA was issued a share certificate which recorded that it was the registered holder of 10 fully paid ordinary shares in IO.

[12] On 26 February 2007, IO signed and lodged with ASIC a Form 484 in respect of the transfer of shares from Westiron to WA.

[13] At 3.30pm on 26 February 2007 the director of IO resolved that IO execute and deliver a joint venture sale and purchase agreement and associated documents. The directors of Westiron resolved to like effect either on 26 February or before 2 a.m. on 27 February 2007.

[14] After 3:30 pm on 26 February 2007:

(a) IO and Westiron entered into a Joint Venture Sale and Purchase Agreement, which was then completed on the same day by the taking of the steps in the following subparagraphs.

(b) IO issued a Promissory Note in favour of Westiron, which constituted the consideration to be provided by IO under the Joint Venture Sale and Purchase Agreement.

(c) IO wrote a letter to Westiron agreeing to waive the condition precedent contained in cl. 2.1 of the Joint Venture Sale and Purchase Agreement.

(d) Westiron wrote a letter in similar terms to IO.

[15] A transfer of Westiron's joint venture interest to IO was effected through various steps taken by the parties to comply with the requirements of the premium joint venture agreement. In particular, IO entered into a deed of covenant and deed of charge in accordance with clause 14.4.

[16] On 27 March 2007, Allens Arthur Robinson sent to Aquila Steel (and Aquila and BD Coal) a new deed of covenant described as a Deed of Assignment and Assumption executed by Westiron and IO.

[17] On 28 March 2007, Aquila wrote a letter (which was not sent successfully until the following day) on behalf of, inter alia, Aquila Steel, confirming "that the Deeds of Covenant are in a form reasonably acceptable to the Aquila participants solely for the purpose of clause 14.4(a) of the relevant Joint Venture Agreements", and noting the existence of some typographical errors which required correction.

[18] On 29 March 2007, Allens Arthur Robison sent the final form of the documents.

[19] On 3 August 2007, WA was registered in the share register of IO as the holder of 10 fully paid ordinary shares in IO. It would seem that this late registration was an oversight. The corresponding transfer in respect of the Belvedere joint venture – a transfer of shares in BC by Belcoal to SEQ – was registered on 26 February 2007.

[20] Figure 3 shows the relevant part of the AMCI group structure after the implementation of the above steps.

Transfer of shares in Resources from Holdings to WA

[21] On 29 March 2007, Holdings transferred all of the shares it held in Resources to WA, such that Resources then became a wholly owned subsidiary of WA and Holdings ceased to form part of the AMCI group for relevant purposes. The final structure of the group is shown in figure 4.

The relevant terms of the Premium Joint Venture Agreement

[22] As the relevant provisions of the Premium Joint Venture Agreement are quite extensive they are set out in the second schedule to these reasons. For ease of reference the definition of "Change in Control", clause 14.2 and clause 14.5(a) are repeated here.

> "Change in Control' occurs for the purposes of clause 14.5 if a 'person who, as at the Commencement Date:
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> (a) does not have the capacity to control the composition of the board of a Participant or of a holding company of a Participant;
> (b) is not in a position to cast, or control the casting of, more than 50% of the maximum number of votes that might be cast at a general meeting of a Participant or of a holding company of a Participant; or
> (c) does not beneficially hold more than 50% of the issued share capital (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital) of a Participant or of a holding company of a Participant,
>
> subsequently has the ability to do so except:
>
> (d) where the Change in Control happens as a result of a change in control (as defined in paragraphs (a) to (c) above) with respect to a Participant, or of a holding company of a Participant, whose shares are quoted on Australian Stock Exchange Limited…or any other recognised stock exchange; or
> (e) in the case of Westiron, where the Change in Control happens as a result of a change in control (as defined in

paragraphs (a) to (c) above) with respect to AMCI Holdings Australia Pty Ltd ACN 075 176 386 or the entities which control AMCI Holdings Australia Pty Ltd ACN 075 176 386.

14.2 Each Participant may Transfer all or any part of its Venture Interest as a matter of right to:

(a) any Related Body Corporate if:

(i) the Related Body Corporate:

(A) entered into an appropriate deed of covenant and deed of charge in accordance with clause 14.4;

(B) remains a Related Body Corporate of the Participant (otherwise the Related Body Corporate must reassign its Venture Interest to the relevant Participant); and

(ii) the relevant Participant is not relieved of its obligations with respect to the Venture Interest if the Related Body Corporate fails to perform them; and

(b) an Original Participant, where the transferring Participant is also an Original Participant.

14.5 If a Change in Control of a Participant occurs then the following provisions apply:

(a) the remaining Participants (and if more than one on a pro rata basis) have an option to purchase the Venture Interest of the Participant that is subject to the Change in Control at a purchase price determined in accordance with clause 14.5(b) within the period in clause 14.5(e)."

The circumstances alleged by Aquila to constitute a "Change in Control" of IO

[23]

(a) A "Change in Control" of IO first occurred on or about 26 February 2007, from when WA had the ability to control the composition of the Board of IO and had the ability to control the casting of more than 50% of the votes at general meeting of IO and held beneficially more than 50% of the share capital of IO.

(b) If it had not occurred before, a 'Change in Control' of IO occurred on 29 March 2007, from when WA had the ability to control the composition of the Board of WA Resources, Westiron or IO and had the ability to control the casting of more than 50% of the votes at general meeting of IO.

(c) If it had not occurred before, a 'Change in Control' of IO occurred on 3 August 2007 when WA became a member of IO. From the registration of the share transfer, WA was in a position to cast more

than 50% of the votes at a general meeting of IO and held beneficially more than 50% of the share capital of IO.

Aquila's submissions on the construction of clause 14.5

[24] A plain reading of the definition of "Change in Control" indicates that if a person who is not in control of the composition of the Board or voting at a general meeting or with a majority shareholding in Westiron or Belcoal as at the Commencement Date subsequently obtains such control or holding, there is a relevant change, triggering clause 14.5 rights and obligations. WA and AMCI (SEQ) did not have the requisite control or holding in 2005 when the joint venture agreements were made, i.e. at the Commencement Date. Therefore when they got control or acquired their respective shareholdings, there was a relevant change and clause 14.5 was triggered.

[25] It is not to the point that there have been no alterations falling within the definition of "Change in control" since IO became a Participant. Clauses 14.2 and 14.5 operate concurrently. That is necessarily so because if IO's construction is to be accepted there would be no work for the "Change in Control" concept after a transfer of a venture interest to a related corporation. That is because the change in control definition applies by reference to circumstances existing at "the Commencement Date".

[26] If it is right that any issue about "Change in Control" may be considered only ***after*** a transfer of a Venture Interest has occurred, the definition will not work. It would require the words "as at the Commencement Date" to be re-written with "as at the time the new Participant acquired its Venture Interest". The words "as at the Commencement Date" cannot be ignored or re-written. The issue is always whether there is a change in control of the composition of the board, voting at a general meeting, or majority beneficial shareholding in comparison with who were the relevant controllers or shareholders as at the Commencement Date. IO and BC each has a new beneficial shareholder and controller of the composition of the board and voting at general meeting (namely, respectively, WA and AMCI (SEQ)). That is why there has been a relevant "Change in Control". Any other interpretation would do violence to the unambiguous words of clause 14.5 and the definition of "Change in Control".

The plaintiffs' contentions on the construction of clause 14.5

[27] Clauses 14.2 in providing for a transfer "as a matter of right" cannot be read as subject to clause 14.5 if regard is had to the structure of clause 14. The clause provides for five permissible means of transferring a joint venture interest namely:

> "(i) A transfer 'as of right' to a 'Related Corporation' within the terms of cl 14.2;
>
> (ii) A transfer with written consent within the terms of cl 14.3
>
> (iii) A transfer pursuant to an option to purchase arising under cl. 14.5;
>
> (iv) A transfer to a 'Continuing Participant' that avails itself of the right of first refusal conferred by cl. 14.6'

(v) A transfer to a third party 'Proposed Transferee' in accordance with cl. 14.6."

[28] Once a party complies with the requirements of one such means of transfer, it need not comply with the requirements of the other. For example, once it has obtained written consent under clause 14.3 it could not be suggested that clause 14.5 could be triggered to deprive the new participant of its interest.

[29] The independent operation of clause 14.2 is shown by the fact that it provides its own remedy for the protection of the non-transferring participant.

[30] The words "as a matter of right" are significant and it cannot be that a transfer "as a matter of right" to a related body corporate will result in forfeiture of the joint venture interest.

[31] The purpose of the provision is to protect the joint venturers against the possibility of being forced into a joint venture with an unwanted stranger, unrelated to the original participants.[1] This purpose is served by the remedy conferred by the express terms of clause 14.2 itself – in the event that the "Related Corporation" to which the transfer was made ceases to be such, it must re-assign its venture interest to the original Participant.

[32] The following example illustrates the fallacy in Aquila's case.

(a) Parent company (P) has two wholly owned subsidiaries, (S1) and (S2). (S1) is an original Participant under the Joint Venture Agreement. It is proposing to transfer its venture interest to (S2).

(b) On the construction for which the Aquila companies contend:

(i) (S1) could transfer its venture interest to (S2) pursuant to cl. 14.2, without triggering a Change in Control under cl. 14.5, only if (S2) was in existence as a wholly owned subsidiary of (P) as at the date of the commencement of the Joint Venture.

(ii) It would, however, be impossible for (S1) to transfer its venture interest to (S2) without the forfeiture of that interest if (S2) was acquired or incorporated by (P) on the next day after the commencement date of the joint venture.

[33] C1ause 14.5 speaks of more than a "Change in Control"; it speaks of a "Change in Control of a Participant". "Participant" is defined to include assigns, such as IO and BC: see cl. 1.1.

[34] Business commonsense dictates that clause 14.5 only operates upon a "Participant" that undergoes a change in Control whilst it is a "Participant". That is, the clause would have nothing to say about:

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1 Cf *Pauls Trading Pty Ltd v Norco Co-operative Ltd* (2006) 24 ACLC 347 per Chesterman J at [24] (affirmed [2006] QCA 128)

(a) a "Change in Control" that may have affected a new Participant in the years prior to it becoming a Participant;
(b) a "Change in Control" that may affect an old Participant in the years subsequent to it ceasing to be a Participant.

[35] The question is whether there has been a "Change in Control" of IO and BC. The Aquila companies contend that these entities have undergone a "Change in Control". That contention should not be accepted because it:

(a) Ignores the fact that there has been no change at all in respect of either of these entities since they became Participants.
(b) Fails to appreciate that the position which obtained in respect a Participant prior to it becoming such is irrelevant to the question posed by clause 14.5.
(c) Relies upon a literal application of the definition of "Commencement Date" as that expression is used in the definition of "Change in Control" in circumstances where:
    (i) The definitions provisions of each agreement expressly state that the definitions are to apply unless the context otherwise requires;
    (ii) The context of clause 14.5 – which combines the apparently rigid definition of "Commencement Date" as that expression is used in the definition of "Change in Control" with the apparently flexible definition of "Participant" as that term is used in clause 14.5 – requires otherwise.

[36] There has in fact been no "Change in Control". The definition "Change in Control" unlike s 46 of the *Corporations Act* 2001 refers to "a person" with "capacity to control the composition of the Board of a participant or of a holding company of a participant". Sub-paragraph (b) is similarly distinguishable from s 46(a)(ii). Section 46(a)(iii) refers to "a body corporate" that "holds more than one half of the issued share capital" of a body whereas sub-paragraph (c) refers to "a person" who "beneficially hold[s] more than 50% of the issued share capital of a Participant or of a holding company of a Participant".

[37] The definition thus directs attention not to "control in an immediate or narrow sense but rather to the seat of ultimate or effective control". Consequently it is appropriate to look beyond the share register and the formal legal mechanisms involved in decision making within corporate groups, so as to focus upon matters of substance, not form - is apparent from the observations of Chesterman J in *Pauls Trading Pty Ltd v Norco Cooperative Ltd.*[2]

[38] The seat of ultimate or effective control always remained the same because at all times:

(a) the Participant in the relevant Joint Venture was an indirect subsidiary of Investments;
(b) the ultimate holding company of the Participant was AMCI International AG.

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2 (2006) 24 ACLC 347 at [57]-[60] (affirmed [2006] QCA 128).

Construction of clause 14 – introductory observations

[39] There are curious features of the joint venture agreement.

[40] An object of definitions such as the definition of "Change in Control" is to ensure that an option given to one party to acquire the interest of another is triggered where there is a change in the ownership or control of the first-mentioned participant or in any companies above it within its group. A principal reason for such a provision is to ensure that a joint venturer should not be obliged to accept a stranger as a co-venturer, at least without having the opportunity to acquire the interest of the co-venturer which has experienced a change of ownership or control. Yet none of the prescribed events in the definition "Change in Control" has effect for the purposes of clause 14.5 with respect to Holdings and any other member of the group above Holdings in the corporate chain. What is caught is any prescribed change in respect of Resources and Westiron. At the time of the entering into of the Premium Joint Venture Agreement, Resources held all the issued shares in the capital of Westiron. The definition also has a limited effect in relation to Aquila and any member of its group of companies. It does not apply to changes in publicly listed companies.

Construction of clause 14 – the relationship between sub-clauses .2 and .5

[41] I turn now to the wording of clause 14. There is considerable force in the submission that, having regard to the overall structure of the clause, clause 14.5 should not be seen as imposing some qualification of or fetter on the rights of a transfer conferred by sub-clauses 14.2, 14.3 and 14.6. One would think it obvious that where a transfer is made with the written consent of the other participant under clause 14.3, it would not be intended that the non-transferring participant could invoke clause 14.5. The introductory words of clause 14.2 which state that a participant's ability to transfer to a "related body corporate" is "a matter of right" also strongly suggest that its operation is not qualified by clause 14.5. The "right" would be significantly circumscribed if a consequence of its exercise was to trigger the right to exercise an option under clause 14.5.

[42] Similar considerations apply to a transfer to a third party pursuant to clause 14.6. Where such a transfer takes place the transferee is bound by all of the provisions of the Joint Venture Agreement. The "Change in Control" definition thus applies in respect of the operation of clause 14.5. But could it have been the intention of the parties to the Joint Venture Agreement that events prior to the third party's acquisition of its joint venture interest could trigger the operation of clause 14.5?

[43] An even stronger indication that clause 14.2 is not intended to be subject to or qualified by clause 14.5 is provided by 14.2(a)(i)(B). The obligation imposed by this provision on the assignee to reassign the Joint Venture Interest to the assigning Participant is inconsistent with the automatic triggering of the option in clause 14.5 in the event of a "Change in Control of a Participant". Clause 14.2(a)(i)(B) expressly states the consequences of an assignee of a Participant ceasing to be "a Related Body Corporate of the Participant" and it is reasonable to conclude that parties intended the consequences so stated to be the only consequences.

[44] There would be little or no point in the obligation to retransfer in clause 14.2(a)(i)(B) if clause 14.5 is to operate in circumstances in which clause 14.2 applies. Also clause 14.5 contemplates the acquisition by a Participant of the Joint Venture Interest of the Participant which has experienced the "Change in Control" not the acquisition of any such interest from a Participant to whom the interest has been re-assigned by operation of clause 14.2(a)(i)(B).

[45] It is pointed out by counsel for Aquila that clause 14.2 is concerned with the assignment of Joint Venture Interests whereas clause 14.5 addresses a "Change in Control" of Participants. As a general proposition that is correct but clause 14.2(a)(i)(B) specifically provides for the consequences of an assignee of a Participant ceasing to be related to it. And in so doing it makes specific provision for the consequences which flow from an assignee Participant ceasing to be related to its assignor. The conventional approach to construction would suggest that the general provisions of clause 14.5 be read subject to the more specific provision, and that the latter take precedence over the former, particularly where the specific provision is made subject to a qualification which has no place in the general provision.[3]

[46] Aquila's argument to the effect that acceptance of the plaintiffs' contentions concerning the inter-relationship of clauses 14.2 and 14.5 would deprive 14.5 of most of its field of operation fails to take into account the nature of clause 14.2 and the ground it covers. The parties intended by clause 14.2 to confer freedom to move from time to time the joint venture interest to a related company. The conditions attached to the right were that the assignee had to maintain its relationship and the assignor had to continue to be bound by the terms of the Joint Venture Agreement. Where an assignment of a joint venture interest is effected under clause 14.6 the assignor incurs no such obligation.

[47] The parties, by clause 14.2, thus intended to deal with transfers of joint venture interests to related corporations in a way which provided its own protections against changes in control of the assignee. That being so, it is unlikely that the contractual intention was that clause 14.5 would override the operation of clause 14.2.

[48] The test for whether one company remains related to another, by virtue of the definition "related Body Corporate" is to be found in the *Corporations Act* 2001.[4] That test does not correspond precisely with the test for "Change in Control". I consider it quite improbable however, that the contractual intention was that clause 14.5 operate in respect of an occurrence within 14.2(a)(i)(B) where the circumstances under which the assignee ceased to be a "Related Body Corporate" of the Assignor contained a matter not relevant for the "Related Body Corporate" test but which would constitute a "Change in Control".

[49] Counsel for the plaintiffs submitted that the asserted weakening of the scope of the operation of clause 14.2, should the plaintiffs' construction be accepted, is illusory. It was pointed out that for 14.2 to take effect the transferring participant had to enter

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3 See eg. *Corbin on Contracts Revised Edition 1998,* Vol 5 para 24.23.

4 See in particular sections 46, 49, 50 and 50AA.

into "an appropriate Deed of Covenant and Deed of Charge in accordance with clause 14.4". That Deed of Covenant has to be "… in a form reasonably acceptable to each participant" and bind the transferee to the provisions of the Joint Venture Agreement as if it had been named therein in place of the transferor. Additionally, the transferring participant, under clause 14.2(a)(ii), would remain bound to perform its joint venture obligations if the transferee failed to perform them. The definition of "Participant" includes reference to "successors and assigns".

[50] The following example supports the plaintiff's contentions. B transfers its joint venture interest to another of A's subsidiaries, C, in exercise of its rights under clause 14.2. B and C cease to be related as a result of a stranger acquiring B's shares. Clause 14.2 (a)(i)(B) is triggered but a re-transfer to B would not make the joint venture interest an asset of the group of which A, B and C initially formed part. In those circumstances, however, there would be a "Change in Control of a Participant" for the purposes of clause 14.5. B remains a Participant by virtue of clause 14.2 and the definition of that term, and once the Joint Venture Interest is re-transferred, there would be a relevant "Change in Control of a Participant" who holds a Joint Venture Interest. "Successors" and "assigns" also come within the definition of "Participant".

[51] Aquila's argument focuses unduly on "Change in Control" whereas clause 14.5 operates only where there has been a "Change in Control of a Participant" who holds a Joint Venture Interest. The holding of a Joint Venture Interest is necessary as, for reasons already discussed, clause 14.5 is based on the premise that the "Change in Control" is that of the Participant with the Joint Venture Interest which is the subject of the option.

[52] The triggering mechanism is the occurrence of an event, namely a "Change in Control". Reference must be had to the definition of "Change in Control" for the purpose of ascertaining the meaning of the expression "Change in Control" in clause 14.5 but not for the purpose of qualifying or altering the language of the clause.

[53] IO was not a "Participant" until such time as a transfer to it was effected in compliance with clause 14.2. That, as subsequent discussion shows, took place after its shares were acquired by WA.

[54] As was pointed out in the submissions made on behalf of the plaintiffs, no sensible reason would be served by triggering the operation of clause 14.5 merely because a transferee of a Participant's interest, although a related company of the Participant at the time of the transfer, had not always enjoyed that status.

Consideration of the three limbs of the definition of "Change in Control" in light of the circumstances surrounding the transfer of shares in IO

[55] Should its argument as to the relationship between sub-clauses .2 and .5 of clause 14 not be accepted, Aquila argues that a "Change in Control" of IO occurred after the

acquisition by IO of the joint venture interest because, although WA had a duly executed transfer of the shares the registration of which was approved by the board of directors of IO, the transfer was not registered until 3 August 2007. In relation to the question of when WA first beneficially held the share in IO, Aquila relies on the general principle that "entry on the register is necessary to constitute membership of a company and … the beneficial ownership of shares without registration does not make a person a shareholder".[5]

[56] Reference was also made in the course of submissions to *Musselwhite v C H Musselwhite & Sons Ltd*[6] and to *Dalgety Downs Pastoral Co Pty Ltd v Federal Commissioner of Taxation*[7] where Webb, Fullagar and Kitto JJ, after referring with approval to the conclusion of Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[8] said:

> "We share this view. Indeed it is not too much to say that the verb 'hold' and its variants, when used in relation to shares in companies, normally refers to the legal ownership of the shares according to the register of members."

[57] The plaintiffs submit that Aquila's approach is rather too legalistic and that the focus should not be on "the formal legal mechanisms" by which title to shares and the control of the board is transferred. Plainly the meaning of "beneficially hold" in relation to shares may vary depending on the context in which it is used.

[58] In *Federal Commissioner of Taxation v Patcorp Investments Ltd*[9] Mason J, at first instance, observed:

> "Although the word 'shareholder' ordinarily signifies a person who is registered as the holder of shares (see Avon Downs Pty. Ltd. v. Federal Commissioner of Taxation [1949] HCA 26; (1949) 78 CLR 353, at pp 363-365), the word 'member' may be wide enough to include a subscriber to the memorandum who is a person whose name is not entered in the register of members (*Companies Act*, 1961, s. 16). And the provisions of s. 151 (1) with respect to keeping of the register of members indicate that a person's character as a member is initially ascertained by reference to circumstances dehors the register."

[59] Jacobs J also concluded, on appeal, that the meaning of "shareholder" in the *Income Tax Assessment Act* 1936 "includes a person who is entitled as against the company to be registered and whom the company is absolutely entitled to register as a member of the company.[10]

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5 *Federal Commissioner of Taxation v Patcorp Investments Ltd* (1973) 140 CLR 247 at 295 per Gibbs J.

6 (1962) Ch 964.

7 (1952) 86 CLR 335 at 341.

8 (1949) 78 CLR 353.

9 At 271-272.

10 At 303.

[60] The plaintiffs also rely on the principle that registration of a person as a shareholder operates retrospectively to the date on which the shareholder was entitled to have his name placed on the register. The principle was stated as follows by Gibbs J in *Federal Commissioner of Taxation v Patcorp Investments Ltd*:[11]

> "If a person ought to have been on the register on a certain day and he is subsequently registered as from that day, speaking generally I consider that it should be held that he was a shareholder on that day. The registration, assuming it to be a proper registration, operates retrospectively from the date on which it was effected to the date at which the name of the shareholder was entered in the register."

[61] Jacobs J in considering the same question in *Patcorp* said:[12]

> "If a company is at the relevant date absolutely entitled to register the person concerned and he is absolutely entitled to have the register rectified so that his name appears thereon as a shareholder at that date, such a person has more than a beneficial interest in the shares enforceable primarily against the vendor. He is in a direct relationship with the company involving reciprocal rights and duties between them."

[62] Mason J, at first instance in Patcorp, referring to the provision of s 151(1) of the *Companies Act* 1961 with respect to the keeping of a register of shareholders said:[13]

> "The requirement in s 151 that there should be entered in the register '(b) the date at which the name of each person was entered in the register as a member' in my view refers, not to the date on which the entry was physically made, but to the date on which he should have been entered in the register as a member, that is, in the case of a subscriber to the memorandum, the date on which he subscribed and, in the case of a transferee, the date on which the directors approved the transfer, or resolved that it be registered."

[63] The principles stated by Gibbs J and Mason J in *Patcorp* were applied in *Kingston v Keprose Pty Ltd (No. 3)*[14] for the purposes of the *Companies (Acquisition of Shares) (New South Wales) Code*.

[64] They were applied also in *Rivkin Financial Services Ltd v Sofcom Ltd*[15] in which Emmett J said:

> "The requirement of s 169 [of the *Corporations Act* 2001 (Cth)], that there be entered in the register the date at which the name of each person was entered in the register as a member, refers, not to the date on which the entry was physically made, but to the date on which the person should have been entered in the register as a member. It is the duty of the officers of a company to give effect promptly to the company's obligations to enter the names of members in the register.

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11 (1976) 140 CLR 247 at 296.
12 At 303.
13 At 272.
14 (1987) 11 NSWLR 404.
15 (2004) 51 ACSR 486 at 518-519.

> Section 169 must be read as requiring the entry in the register of the date when the directors approve or direct an allotment of shares – see *Commissioner of Taxation v Patcorp Investments Limited* (1976) 140 CLR 247 at 272; 3 ALR 251 at 269-70; 10 ALR 407. If a person ought to have been on the register on a certain day and he is subsequently registered as from that day, that person should be held to be a shareholder on that day. Registration operates retrospectively from the date on which it was effected to the date at which the name of the shareholder was entered in the register – *Patcorp Investments Limited* at 296; ALR 421."

[65] It is submitted on behalf of Aquila that the retrospective operation of membership as a result of registration "cannot alter the actual facts as they occurred". Consequently, if any limb of the definition of "Change in Control" was satisfied after the transfer of the shares in IO, the retrospective effect of registration cannot alter the position.

[66] I do not accept the correctness of the submission. The foregoing review of the authorities shows that the principle under which registration of a share transfer operates back to the date of approval of the transfer by the company's directors has operation beyond the contractual relationship between the company and its members. And I do not see why the parties would not have wished orthodox principles relating to the transfer of shares to have applied to the operation of clause 14 and the definition of "Change in Control".

[67] The object of contractual construction is to "ascertain and give effect to the intentions of the contracting parties".[16] Those intentions, to be determined objectively, are "what a reasonable person would have understood [the words of the contract] to mean."[17] And to ascertain that "normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction."[18] Such a reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation which they were in at the time of the contract [19] and a commercial contract, like the Agreement, "should be given a businesslike interpretation". Its interpretation requires "attention to … the commercial circumstances which the document addresses, and the objects which it is intended to secure"[20] and it should be "fairly and broadly, without being too astute or subtle in finding defects".[21]

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16 *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 at 737.

17 *Toll (FBCT) Pty Limited v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179.

18 *Toll (FBCT) Pty Limited v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179.

19 Per Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912, cited with approval by Gleeson CJ, Gummow and Hayne JJ in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188.

20 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589.

21 Per Lord Wright in *Hillas and Co Ltd v Arcos Ltd* (1932) 147 LT 503 at 514 referred to with approval by Gibbs J in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109.

[68] The Joint Venture Agreement is a commercial document intended to establish the legal relationship between co-venturers in a large scale mineral exploration and development project. In determining rights and obligations under such a document, in the absence of a clear indication to the contrary, the parties should be regarded as being concerned with substance over form and technicality[22] and "no narrow or pedantic approach is warranted".[23] Although concerned with matters of conveyancing practice it seems to me that some guidance as to the manner in which a provision such as 14.5 is to be applied may be derived from the following passage from the reasons of Holland J in *Frankcombe v Foster Investments Pty Ltd*:[24]

> "The question whether a party has failed to be ready willing and able to complete, so as thereby to entitle the other party to rescind the contract, is, in its consequences upon the parties, too important a matter to be determined by tricks or trifles, Street C.J. in Eq., in considering the possible consequences of his view that the giver of a notice to complete had to be in a position to complete throughout the period of the notice, said in *Halkidis v Bugeia*: 'I do not regard this generally stated proposition as holding any comfort for a purchaser who employs a manoeuvre, by what may be described as a last-minute attempt, to catch his vendor unprepared. Cases of that sort, as does the case now before the court, involve questions of fact on readiness, willingness and ability. Such questions will be resolved with due regard to common sense and to the practicalities of ordinary conveyancing transactions.'"

[69] I now turn to a consideration of the three limbs of the definition "Change in Control" in light of these principles and having regard to the circumstances surrounding the transfer of shares in Westiron.

[70] On 26 February 2007, Mr Macdonald, the sole director of IO and Westiron signed the share transfer for both transferor and transferee for the shares in IO being transferred from Westiron to WA. Also on 26 February Mr Macdonald as sole director of IO, resolved that the transfer be registered, that the existing share certificate be cancelled and that a new share certificate issue. A new share certificate was then issued on 26 February. It would seem, however that by an oversight the share register was not actually altered until 3 August 2007.

[71] "Capacity to control" does not correspond precisely with actual, present or direct control. It accommodates circumstances in which a person has the ability to take such steps as are necessary to give him actual control. The expression is apt to accommodate the circumstances existing on 26 February 2007 under which WA held a transfer of the shares in IO capable of immediate registration and a share certificate which showed that the shares were held in its name. The transfer and share certificate were obtained in the course of a series of transactions between related corporations designed in part to ensure that full ownership of the shares in IO and control over its board was vested forthwith in WA. In such circumstances a

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22 *Sirius International Insurance Co v FAI General Insurance Ltd* [2004] 1 WLR 3251 at 3257, 3258.

23 *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1967) 118 CLR 429, per Barwick J at p 437.

24 [1978] 2 NSWLR 41 at 51.

conclusion that WA lacked "the capacity to control" would be both pedantic and remarkable. The following discussion further explains why the "capacity to control" existed at relevant times.

[72] The same reasoning applies to paragraph (b) of the definition. As a general proposition, a purchaser of shares in a company, in the absence of agreement with the vendor to the contrary, is not entitled to require the vendor to exercise the votes attaching to those shares in accordance with the purchaser's directions. The vendor although a trustee for the purchaser of the estate sold is not a mere or bare trustee until paid the full purchase price.[25] But here the full purchase price was paid on 26 February 2007 as the new share certificate acknowledges. Westiron was thus a trustee of a bare trust and there is authority for the proposition that it could not exercise voting rights in respect of the shares without the consent or direction of WA.[26]

[73] Even if WA was not able to direct the manner in which voting rights were to be exercised I would have concluded that as a matter of substance WA was "in a position to …control the casting of, more than 50% of …the votes" in IO. Irrevocable steps had been put in train to ensure that control of IO's board and title to its shares vested in WA. A share certificate had been issued to WA. WA could have obtained an order preventing Westiron from exercising rights in respect of the shares in IO except in accordance with its directors. But that addresses legal technicality, not practical reality. Can it be doubted that the directors of the transferor, Westiron, would have acted at the direction of WA had the occasion arisen whilst the subject transaction was being perfected? In substance there was no change of the nature contemplated by subparagraph (b) after the resolution of the director of IO and the issuing of the new share certificate on 26 February.

[74] So too in considering paragraph (c) of the definition "Change in Control", if attention is paid to substance rather than form, it will be apparent that at the time IO became a Participant its shares were beneficially held by WA. To so conclude requires no straining of language. The expression "Beneficial owner" is commonly used to describe the interest of a person who has no legal interest in shares or real property in consequence of not being a registered proprietor or because the property is held in trust for that person by another. The prefix "beneficial" may signify also that the interest is not a legal one. In *Patcorp Investments Limited*,[27] Mason J observed that "a beneficial holder of shares in a company …cannot accurately be described as a 'shareholder' or 'member' of a company …" Plainly, his Honour was using the term "beneficial holder" to refer to an entity which held shares beneficially but whose interest as member was not recorded in the register of members.

[75] But, as is usually the case, an analysis of the contractual context in which the subject words are used provides a surer guide to their meaning than recourse to judicial pronouncements about their meaning in other contracts and contexts.

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25 *Musselwhite v C H Musselwhite & Sons Ltd* and *Shaw v Foster* (1872) LR 5 HL 321.

26 *Re Fernlake Pty Ltd* [1995] 1 Qd R 597 at 603.

27 At 273.

[76] The expression "beneficially hold" in (c) describes a shareholding, whether registered or unregistered, in which the holder has the beneficial interest in the shares. The parties were not concerned with the formalities of registration but with changes in rights in respect of shares which had the capacity to change control of the company in question.

[77] For the above reasons, I find that there was no "Change in Control" as the defendants allege which triggered the operation of clause 14.5 of the Premium Iron Ore Joint Venture Agreement. It follows that there was no change in control as alleged by the first and second defendants in 3469/2007 which triggered the operation of clause 14.5 of the Belvedere Joint Venture Agreement.

The contentions of the fourth and fifth defendants in proceeding 3469 of 2007

[78] The third, fourth and fifth defendants (the "RDA" defendants) were neutral on the question of whether "a Change in Control" had occurred giving rise to an option under clause 14.5 of the Belvedere Joint Venture Agreement. They contended however that if Aquila was successful on that issue its rights were extinguished or qualified by the terms of an exploration, study and purchase option agreement dated 20 July 2005 ("the ESPO Agreement") entered into between BD Coal Pty Ltd, Belcoal, Rio Doce Australia Pty Ltd ("RDA"), Aquila Resources, AMI Holdings and Itabira Rio Doce Company Limited ("ITACO").

[79] Under the ESPO Agreement, BDC and Belcoal granted to RDA an option to acquire a 51% interest in the Belvedere Joint Venture on the terms contained in a document entitled "Amended and Restated Joint Venture Agreement – Belvedere Coal Joint Venture". Clause 8.2 of the ESPO Agreement provides that neither BDC nor Belcoal could transfer the whole or any part of its interest in the Belvedere Joint Venture Agreement or the property the subject of that agreement without the prior written consent of RDA. RDA's option under the ESPO Agreement was exercisable within 18 months of 20 July 2005 unless the option period was extended by agreement between RDA, BDC and Belcoal. RDA argues that this option gives it an equitable interest in the property the subject of the option which takes priority to any interest BDC may have as a result of any option acquired by it under clause 14.5 of the Belvedere Joint Venture Agreement. Indeed, it contends that because BDC requires RDA's prior written consent under clause 8.2 to obtain the transfer of BC's venture interest and as RDA has not given that consent, BDC has no interest under clause 14.5 which equity will protect.

[80] In the alternative, RDA contends that its equitable interest under its option has priority over any interest of BDC arising under clause 14.5. In the further alternative RDA asserts that under the ESPO Agreement, BDC waived its rights under clause 14.5 of the Joint Venture Agreement in respect of the 25.5% joint venture interest RDA elected to purchase from AMCI (BC).

[81] In view of my conclusions on the construction of clause 14.5 of the Belvedere Coal Joint Venture Agreement it is unnecessary for me to decide these questions. RDA's counterclaim is introduced as follows:

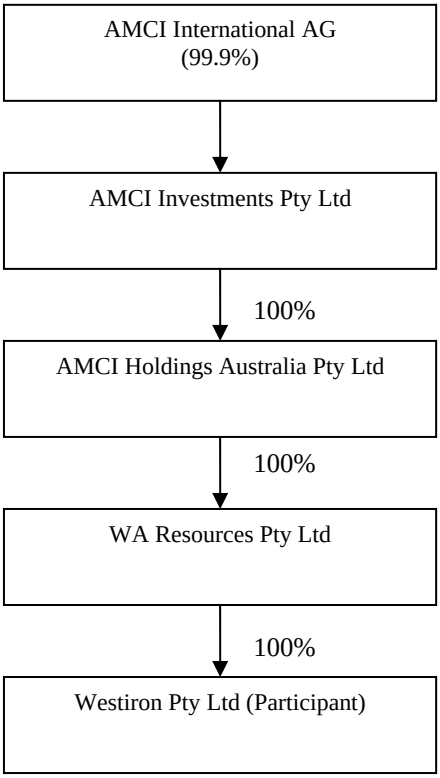
> "This counterclaim is made by [RDA] against the possibility that the First and Second Defendants establish that there has been a change in control with respect to the First Plaintiff or Second Plaintiff as a participant of the joint venture, enlivening an option to purchase in the First Defendant pursuant to clause 14.5 of the Joint Venture Agreement."

Conclusion

[82] In each of 3468/07 and 3469/07 there will be declarations in terms of paragraphs 1 and 2 of the prayer for relief in the Statement of Claim. It will be ordered that in 3468/07 the defendants pay the plaintiffs' costs of and incidental to the proceedings including reserved costs, if any. In 3469/07 it will be ordered that the first and second defendant pay the plaintiffs' and the other defendants' costs of and incidental to the proceedings including reserved costs, if any.

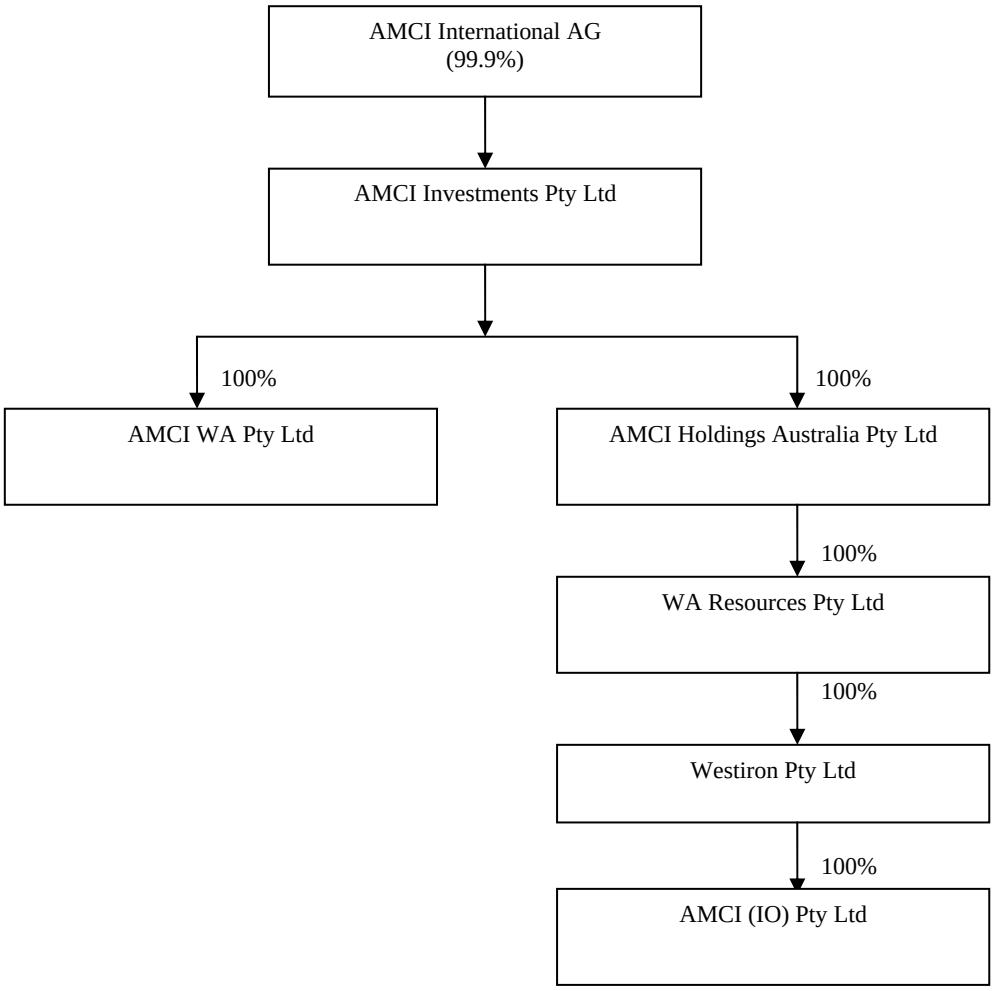
Schedule 1

Figure 1



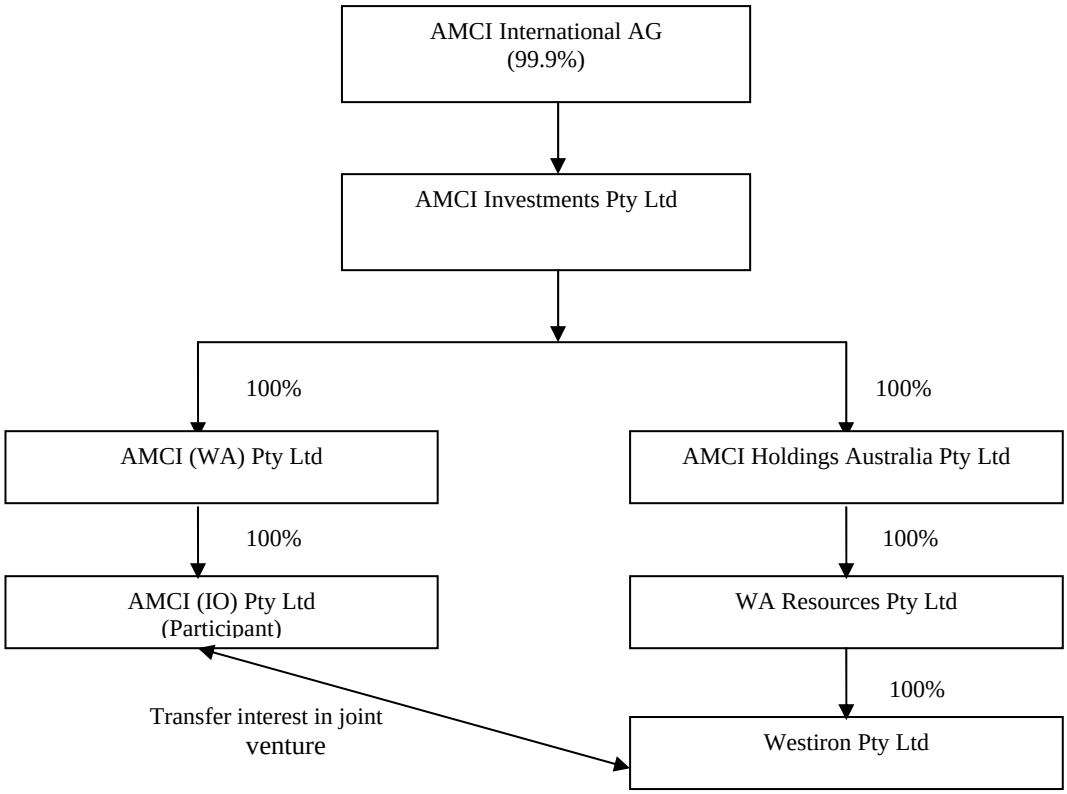
Schedule 1

Figure 2



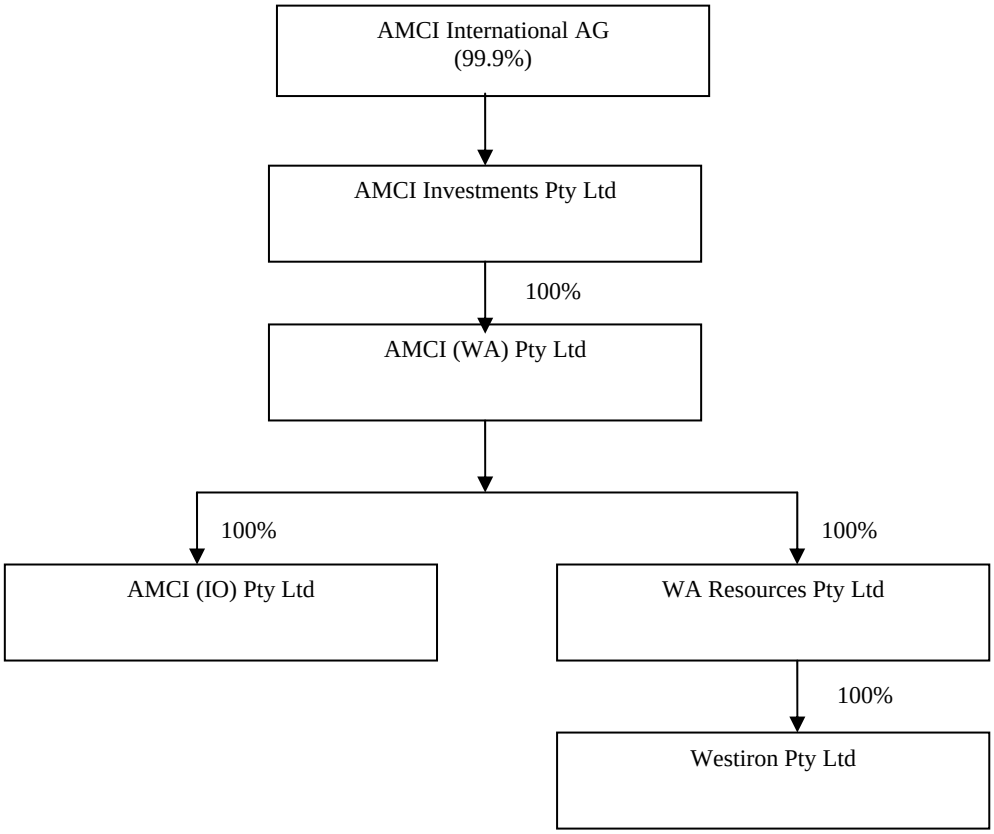
Schedule 1

Figure 3



Schedule 1

Figure 4



Schedule 2

‘Commencement Date’ means the date of execution of this Agreement.

‘Change in Control’ occurs for the purposes of clause 14.5 if a person who, as at the Commencement Date:

(a) does not have the capacity to control the composition of the board of a Participant or of a holding company of a Participant;

(b) is not in a position to cast, or control the casting of, more than 50% of the maximum number of votes that might be cast at a general meeting of a Participant or of a holding company of a Participant; or

(c) does not beneficially hold more than 50% of the issued share capital (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital) of a Participant or of a holding company of a Participant,

subsequently has the ability to do so except:

(d) where the Change in Control happens as a result of a change in control (as defined in paragraphs (a) to (c) above) with respect to a Participant, or of a holding company of a Participant, whose shares are quoted on Australian Stock Exchange Limited or any other recognised stock exchange; or

(e) in the case of Westiron, where the Change in Control happens as a result of a change in control (as defined in paragraphs (a) to (c) above) with respect to AMCI Holdings Australia Pty Ltd ACN 075 176 386 or the entities which control AMCI Holdings Australia Pty Ltd ACN 075 176 386.

‘Original Participants’ means Aquila and Westiron.

‘Parent’ means the ultimate Australian incorporated holding company of an incoming Participant, or such other company acceptable to the existing Participants.

‘Participant’ means each of Aquila and Westiron and their respective successors and assigns in accordance with this Agreement.

‘Related Body Corporate’ has the meaning given in the Corporations Act.

'Transfer' means to sell, assign, transfer, convey, declare any trust or otherwise dispose of, and 'Transfer', 'Transferred' and 'Transferring' have corresponding meanings.

'Venture Interest' means, in relation to a Participant, the respective proportion, expressed as a percentage, by which that Participant, on a several basis, subject to this Agreement:

(a) is the beneficial owner as a tenant in common of an undivided share of Venture Property;

(b) and participates in all other rights and liabilities accruing to, or incurred by the Participants in, or arising out of this Agreement.

'Venture Property' means:

(a) the Applications;

(b) the Tenements;

(c) the Mining Information;

(d) all assets, property and rights acquired by or on behalf of the Joint Venture pursuant to the terms of this Agreement;

(e) all fixtures, machinery, plant, equipment and supplies acquired for the purposes of the Joint Venture;

(f) any other Mineral Rights and other property or rights of any description, whether real or personal, acquired for the purposes of the Joint Venture;

(g) all Iron Ore and Extracted Iron Ore until such time as the entitlement of the Participants thereto arises in the terms described in clause 9.1;

(h) subject to clause 7.13, the issued capital of the Manager; and

(i) any Feasibility Study,

but specifically excludes where the Manager is a Participant, the rights and obligations as Manager as set out in this Agreement.

14. ASSIGNMENT AND PRE-EMPTIVE RIGHTS

14.1 No Participant may assign or Transfer or purport to assign or Transfer this Agreement, its Venture Interest or any right under this Agreement other than in accordance with this clause 14.

14.2 Each Participant may Transfer all or any part of its Venture Interest as a matter of right to:

(a) any Related Body Corporate if:

(i) the Related Body Corporate:

(A) entered into an appropriate deed of covenant and deed of charge in accordance with clause 14.4;

(B) remains a Related Body Corporate of the Participant (otherwise the Related Body Corporate must reassign its Venture Interest to the relevant Participant); and

(ii) the relevant Participant is not relieved of its obligations with respect to the Venture Interest if the Related Body Corporate fails to perform them; and

(b) an Original Participant, where the transferring Participant is also an Original Participant.

14.3 Except as provided in clause 14.1 a Participant may not Transfer all or any part of its Venture Interest without the written consent of the other Participant, unless it has first observed and complied with the pre-emptive rights and provisions set out in this clause 14 or any other provisions contained in this Agreement which deal with the ability or obligation of a Participant to Transfer its Venture Interest whether as a consequence of the default provisions in clause 10 or otherwise.

14.4 No Transfer under this clause 14 is effective unless and until the Transferee has executed and delivered to each of the Participants and the Manager, as the case may require:

(a) a deed of covenant, in a form reasonably acceptable to each Participant, by which the Transferee covenants to observe, perform, comply with and be bound by the provisions of this Agreement, and any other Project Documents as if the Transferee had been expressly named in this Agreement and those other Project Documents in the place of the Transferor;

(b) executed transfers of the relevant proportion of the Participant's shares in the Manager;

(c) and a deed of charge executed by the Transferee on the same terms and conditions as the Cross Charge save for the necessary amendments reflecting the Transferee's introduction as a Participant.

14.5 If a Change in Control of a Participant occurs then the following provisions apply:

(a) the remaining Participants (and if more than one on a pro rata basis) have an option to purchase the Venture Interest of the Participant that is subject to the Change in Control at a purchase price determined in accordance with clause 14.5(b) within the period in clause 14.5(e);

(b) the purchase price for the Venture Interest of the Participant that is subject to the Change in Control will be determined as at the date of the Change in Control by an Independent Expert with the valuation to be requested by the remaining Participants within 60 days of the fact of the Change in Control first becoming known to the remaining Participants provided that the purchase price for any Development Area during the Development Period will be calculated in accordance with clause 6;

(c) all parties must co-operate fully with the Independent Expert and acknowledge that:

(i) the Independent Expert acts as an expert and not as an arbitrator;

(ii) the determination of the Independent Expert is final and binding on the parties; and

(iii) the cost of the Independent Expert is to be borne by the Participant subject to the Change in Control;

(d) the Independent Expert must apply the standards prescribed by the Australasian Institute of Mining and Metallurgy when undertaking a valuation;

(e) all or any of the remaining Participants may exercise their option pursuant to clause 14.5(a) by notice to that Participant within 14 days after determination of the purchase price, by notice in writing to that Participant and if more than one remaining Participant exercises the option those Participants are entitled to acquire the Venture Interest in the proportion that their respective Venture Interests bear to the aggregate of their Venture Interests;

14.6 A Participant (‘Transferor’) may at any time Transfer the whole or any part of its Venture Interest to any person ('Proposed Transferee') if the Transferor first offers the Venture Interest to the other Participant ('Continuing Participant') in accordance with the following.

(a) The offer to the Continuing Participant must be made by notice to the Continuing Participant, containing:

(i) the name and address of the Proposed Transferee together with sufficient details to enable an assessment of its financial standing and, where applicable, the financial standing of its ultimate holding company;

(ii) all the terms and conditions of the proposed Transfer;

(iii) an offer to sell such Venture Interest to the Continuing Participant on terms and conditions no less favourable to the Continuing Participant than those offered by the Proposed Transferee;

(iv) a statement as to whether or not the Continuing Participant must accept the offer in respect of the whole (and not just a part only) of the Venture Interest on offer;

(v) where the consideration to be paid by the Proposed Transferee is not to be paid in cash on the date of sale, then the cash equivalent of the consideration to be paid by the Proposed Transferee on the basis that the cash equivalent is paid on the date of sale

with such statement being certified as being correct by the Independent Expert.

(b) The Continuing Participant has the right to accept such offer by giving the Transferor notice to that effect at any time during a period of 60 days after being given such notice. Any purchase by the

Continuing Participant of the whole or a part of a Transferor's Venture Interest will be subject to obtaining any necessary Approvals. The responsibility for obtaining such Approvals rests on the Continuing Participant or Transferor which requires such Approval. If the Continuing Participant fails to accept the offer of the Transferor within the 60 day period and the only reason for such failure is the Continuing Participant's inability to obtain the necessary Approvals, then, provided that the Continuing Participant has notified the Transferor of the Approvals still to be obtained and has accepted the offer of the Transferor with in such time period subject to the obtaining of such necessary Approvals, either unconditionally or on conditions acceptable to the Continuing Participant, the time period will be deemed not to have expired with respect to the Continuing Participant until the expiration of a further 30 days after the date upon which such period would otherwise have expired.

(c) The Continuing Participant may accept such offer on the basis that, where it applies, the cash equivalent constitutes the consideration payable by the Continuing Participant accepting the offer.

(d) Prior to any such Transfer, the Transferor must procure that:

(i) the Proposed Transferee enters into a covenant reasonably satisfactory in form and substance to the Continuing Participant by which the Proposed Transferee must covenant and agree to be bound by all the provisions of this Agreement and the other Project Documents and to assume, observe and perform all of the obligations of the Transferor;

(ii) where the Proposed Transferee is a subsidiary of another corporation, the Proposed Transferee must (if required by the Continuing Participant) provide to the Continuing Participant and the Manager a guarantee from its Parent in a form acceptable to the Continuing Participants, to secure to the Continuing Participant the due and punctual performance by the Proposed Transferee of its obligations under the Joint Venture Agreement and the other Project Documents; and the Proposed Transferee executes a deed of charge on the same terms and conditions as the Cross Charge save for the necessary amendments reflecting the

Proposed Transferee's introduction as a Participant.

14.7 A Participant must not Transfer or Encumber the whole or any part of its Venture Interest except in accordance with this Agreement.

14.8 Where the Transferor and the Proposed Transferee have complied with this clause 14, the Transferor and where applicable its Parent shall to the extent of the Venture Interest being transferred, be released by the other Participants from all liabilities arising under this Agreement and all other Project Documents on and from the date on which the Transferor and the Proposed Transferee have complied in full with this clause 14 and any other provisions contained in this Agreement which deal with the ability or obligation of a Participant to transfer its Venture Interest. The Participants will execute all documentation necessary to give effect to this release including a release of any guarantee given by the Parent of the Transferor with respect to that Transferor and a release of the Transferor's obligations and the other Participants' rights against the Transferor under the Cross Charge.