Joint Venture

Guidance

Disclaimer

This guide provides information on collaborating with other organisations. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding about what to do.

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What is a joint venture?

A joint venture is an agreement between two or more parties to work together and pool resources for the purpose of completing a specific task or project, usually for a specific amount of time.

How is a joint venture created?

Under Australian law, it does not have a specific definition ascribed to it. As a result, it can be formed using a variety of incorporated or unincorporated legal structures. These include through contract, the establishment of a corporation, association, or other business entity. Regardless of the structure used to form the joint venture, the most important factor in its establishment is the drafting of the written agreement that sets out the rights and obligations of each party to the joint venture. Although not necessary, this document helps to determine and regulate the entitlements, liabilities and other obligations placed on the parties involved.

When is a joint venture used?

Joint ventures can be created for a wide range of reasons, including to:

- share resources (e.g. funding, infrastructure, expertise, relationships, etc.);
- reduce costs; and
- expand reach (by virtue of more resources and reduced costs).

How is a joint venture different from a partnership?

A joint venture is typically created for a single task or project, whereas a partnership is typically formed with the intention of continual business. The three main differences between joint ventures and partnerships are regulations, liability and tax.

Regulations

Joint ventures are governed by the joint venture agreement created by the parties, along with common law and contract law. If the parties to the joint venture are corporations, the *Corporations Act 2001* (Cth) will also regulate the agreement. In comparison, partnerships are governed by State and Territory-based Partnership Acts. Under these legislations different types of partners are bound by specific obligations and liabilities irrespective of the unique partnership agreement created.

Liability

Under a joint venture, the actions of one party do not bind the other(s) without the consent to being bound. Typically, this issue will be addressed within the joint venture agreement prior to activities commencing. For instance, parties may include a clause in their joint venture agreement that describes whether they will share liabilities or be held separately responsible, and if so, under what circumstances. In comparison, a partnership will automatically bind parties with certain liabilities in relation to debts and fiduciary duties (see our partnership guide for more information).

Tax

All parties involved in a joint venture can make and claim their own tax deductions. In comparison, partners (under a partnership arrangement) must pay tax on their share of the partnership profit at their individual tax rate.

Risks

It can be difficult to differentiate between a joint venture and a partnership. In some circumstances Courts have ruled that some joint venture agreements were in effect a partnership, and therefore imposed the de-facto obligations of a partnership upon the parties. For this reason, it is important to ensure you have a joint venture agreement in place to avoid confusion and disputes down the track. Your agreement should clearly state your intent to enter a joint venture and that the joint venture is being formed for a specific purpose and limited duration. It is best to seek legal advice when preparing this agreement to ensure it meets the specific needs of your circumstances.

How long can you use a joint venture?

There is no fixed time on how long a joint venture can be used; however, it will typically be limited to the time needed to complete a specific task or project. This time will usually be specified within the agreement, with an option to extend the arrangement if the specific task or project remains uncompleted. A joint venture should not be created with the intention of operating on an ongoing, permanent basis. As noted above, this may be interpreted by the Court as a partnership and give rise to the de-facto obligations of a partnership, including by changing the liabilities and tax obligations of the parties. This example shows there is always the risk of unwanted or unintended obligations when entering into any type of collaboration. To avoid this risk, we encourage you to seek legal advice that is unique to your circumstances. For more information, see our partnership guide.

Who can use a joint venture?

Joint ventures can be used by two or more natural persons or entities seeking to work together on a specific task or project.

What are the typical obligations of each party?

Each joint venture is unique so the only authoritative source for the obligations of each party is the unique agreement the parties have created.

Typical obligations might include each party contributing resources, such as funding, staff, expertise and/or infrastructure, to achieve the common goals of the venture. The parties will also commonly share the profits and losses that may occur during the venture, but this will need to be determined by the parties, usually as a separate clause in their joint venture agreement.

How to decide if a joint venture is right for you

Benefits

Projects of any size can benefit from a joint venture as it allows for:

- expansion of work;
- growth of activities without seeking additional resources (e.g. funding, staffing, etc.);
- the development of new activities;
- increased access to resources (e.g. funding, staffing, etc.);
- diversity of experiences and expertise; and
- a temporary commitment between the parties (allowing parties to respond to any immediate and/or time-sensitive needs).

Risks

Some of the potential risks of entering joint venture arrangements include:

- difficulties in finding trusted parties to enter into an agreement with;
- uncertainty as the success of a joint venture depends on working collaboratively and towards a common goal;
- risk of conflict or lack of commitment by parties to the joint venture agreement;
- giving up a degree of control over the direction of the project; and
- potential delays in decision-making due to increased complexity of project governance.

Drafting a joint venture agreement

It is important to have a written joint venture agreement so that all parties understand their roles, responsibilities, and liabilities under the arrangement. The best way to take care in drafting this agreement is by seeking legal advice that is unique to your circumstances.

Terms and conditions to consider

For general guidance only, we have provided examples of the common provisions that are included within a joint venture agreement. However, every joint venture relationship is different and needs to reflect and respond to the unique circumstances and needs of the parties involved.

Key terms and conditions to consider include:

Key persons	• Contact persons • Decision-makers (this may be different for different areas of decision-making such as finance, strategy, communications) • Project managers • Project specialists (i.e. is there an individual(s) with specialists skills and experiences needed to undertake the work)
Scope, structure, and objectives	• The nature and scope of the work to be completed • Any key deliverables and/or milestones • The process for revision of scope/strategy • The legal structure of the parties as individuals and the intended legal structure/arrangement they are creating (e.g. joint venture through the establishment of a new corporation, association, contract, etc.) • The extent to which the parties intend to be bound (regulations, tax, law, fiduciary obligations if applicable, etc.)
Collaboration period and schedule	• Start and end date • Date of review/renewal • Due date for delivery of key deliverables and milestones • Any fixed notice periods to the other party, etc.
The obligations and liabilities of each party	• Resources to be contributed (e.g. funding, staffing, infrastructure, expertise, etc.) • Division of roles and responsibilities between the parties • The key accountabilities of each party • Whether parties will share liabilities or be held separately responsible and if so, under what circumstances.

Key policies and procedures

- Project management processes and responsibilities
- Reporting schedule, hierarchy, milestone and review meetings
- Strategic decision-making processes, approvals and delegations
- Communications processes, approvals and delegations
- Codes of conduct and other performance requirements

Financial management

- Financial contributions of each party
- Financial management, decision-making and reporting policies, processes, approvals and delegations for the project
- Accounting, book-keeping and auditing policies and processes
- Distribution of profit/loss between the parties
- Financial liability of each party
- Financial remedies in the event of a dispute

Confidentiality

Policies and processes for the protection of sensitive and confidential information, including:

- The type and nature of sensitive information likely to be accessed and/or used during the work
- Who is authorised to access and/or use it and under what circumstances
- How will breaches of this be dealt with and/or remedied

Intellectual property rights and Data Sovereignty

Policies and processes for the protection of intellectual property rights and Data Sovereignty, including:

- Who will own any property/data created
- Who and how can any property/data be used during the process
- How will the transfer of ownership take place once the collaboration ends
- How will personal and sensitive data collected during the project be monitored, stored, and protected (following the guidelines of the *Privacy Act 1998* and relevant state/territory legislation)
- How will breaches of this be dealt with and/or remedied

Exclusivity and non-compete

- Is there a need to put protect against other parties trying to poach employees, key partners and other personnel? To be effective such clauses need to specify a duration of time for this clause to apply after the project is completed.
- Can parties work with other external parties or are they in an exclusive collaboration with the other parties to the joint venture?

	It should also clarify whether and when can these parties collaborate with other entities engaged in similar businesses and/or projects with similar activities.
Dispute Resolution	• The process for resolving disputes (e.g. you may agree to a specified style of dispute resolution, or to work with an agreed third party) • Any preferred remedies in the event of certain circumstances (i.e. non-performance may incur a fixed penalty)
Termination	• The process for project closure (i.e. how will activities be wound up and project materials and assets be divided) • The due process to follow in the event of termination (including division of project materials and assets, and in the case of multiple parties, add provisions regarding the process if only one party chooses to exit the contract)

Template Collaboration Agreement

In our Collaboration Agreement Guide we provide a general template for drafting a collaboration agreement. This template is a guide only and must be amended to suit your individual needs and circumstances, including the legal structure you intend to create. We encourage you to seek legal advice before entering any joint venture arrangement.

More information

For access to more resources on how to establish your JR initiative, visit our resources hub on the Justice Reinvestment Network Australia website, or contact the JR Partner team on justicereinvestment@nintione.com.au.