Issues to consider when entering into a joint venture

Documenting all aspects of joint ventures between parties can be a challenging and time-consuming task. More so, where parties wish to actively pursue and move fast on a particular project in a commercially savvy manner.

Ensuring both parties to the joint venture are adequately protected, and significant issues addressed at the outset, is pivotal to long term success. Too often we see joint ventures progressing with inadequate consideration of relevant matters and disputes arising from ill-conceived and inadequate agreements. All of which could have been avoided.

Our joint venture checklist is intended to support parties at the initial steps of joint venture negotiations and discussion. It is intended to support the consideration of relevant legal matters as part of the wider joint venture commercial overview.

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1. **Who are the parties?**

   A simple but very significant question. The parties to the venture should be clearly identified and documented. For example, it may be the case that one of the parties is part of a wider corporate group, in which case the specific entity which is to act as the party for that group should be clearly identified.

   The participants in the joint venture should also conduct adequate due diligence on each other in order to satisfy themselves that the parties are properly identified and have requisite capabilities.

2. **Will any parent company guarantees be required from either of the parties?**

   This is usually required where one of the parties to the joint venture is a subsidiary of a group and the relevant entity does not itself hold sufficient capital to compensate for any breach that it may be liable for under the joint venture arrangement.

3. **What is the purpose of the joint venture?**

   The parties should be clear on the intended nature of the business of the joint venture and whether the joint venture is to be for a specific or more general purpose.

4. **What is the scope of the joint venture?**

   The parties may wish to consider whether there are to be any geographical, time or other restrictions on the scope of the joint venture.

   If one or more of the parties intend to invest in the venture for a limited period of time, the parties should consider the exit strategy for such parties, such as a trade sale, management buyout or IPO.

5. **Will the joint venture operate in a number of jurisdictions?**

   If the operations of the joint venture are to span across a number of jurisdictions, including Australia, it may be necessary to establish subsidiary entities or branches in the foreign jurisdictions in which the venture is to operate.

6. **Will the joint venture be subject to any pre-conditions?**

   The parties should consider whether there are any pre-conditions that should be imposed prior to the joint venture coming into existence. There are a number of conditions precedent that may be appropriate from a legal perspective, such as obtaining approvals from the relevant authorities in order for the joint venture to conduct the activities that it intends to conduct.

7. **Will the joint venture operate through an incorporated entity or an unincorporated arrangement?**

   The parties should consider whether the joint venture is best operated through a joint venture entity or by commercial agreement only. If profits, assets or liabilities are to be shared, an incorporated joint venture entity, such as proprietary limited company, is likely to be necessary. However, if the parties merely intend to share revenues from certain activities, an entity may not be required.

   If an incorporated vehicle or entity is to be formed, it is important to consider the appropriate jurisdiction of incorporation and form of entity for the particular venture, taking into account the nature, location and scope of the operations to be undertaken.

8. **What brand will the joint venture operate under?**

   If a joint venture entity is to be formed, or if the joint venture is to operate under a trade name, the parties may need to agree on a name for the venture. It is common for at least one of the parties to licence its name and logo for use by the joint venture. If this is to occur, the licensing for the use of the intellectual property by the joint venture will need to be appropriately documented and terms agreed.

   The parties should also carefully consider registering their respective trade names and logos with IP Australia if they are to be used by the joint venture in order to ensure that their rights in relation to the intellectual property will continue after they cease to be interested in the joint venture.

9. How much capital will be required for the venture?

The parties will need to consider the amount of capital that will be required for the joint venture and the capital structure to be adopted.

It may be the case that portions of the capital will be paid in tranches, either on certain specific dates or upon certain milestones being achieved. If this is the case, the tranche provisions should be clearly documented.

10. What is each party contributing to the venture?

The parties should consider what each party will be contributing to the joint venture and agree on the value of such contributions at the outset. For example, one of the parties may provide staff, another may provide capital, use of assets, technology, know-how, intellectual property rights, use of their own employees, customers, or office space. All intended contributions will need to be documented clearly in the joint venture agreement in order to avoid any potential disputes.

11. What proportionate interest will be held by each of the parties?

The parties should consider what proportionate interest will be held by each of them in relation to the joint venture. Where interests are to be held in the form of shares in the capital of a joint venture company, the parties may wish to have separate classes of shares with different voting rights.

12. How will the joint venture be financed?

The parties may wish to agree at the outset whether any further funding will be required from an external source (debt and/or equity) or from the joint venture parties.

If finance is to be obtained from an external source, the financier may require one or more of the joint venture parties to provide security.

13. How will the joint venture be managed?

With heightened scrutiny on corporate governance impacting investor and lender decision-making, compliance with basic corporate administrative and regulatory requirements has never been more important.

Australian Securities and Investments Commission (**ASIC**) regulations and the detailed provisions of the Australian corporations legislation mean staying on top of compliance requirements is an essential element of a director's role and in turn the joint venture parties themselves.

Procedure for Appointment of Directors/Managers

The parties may wish to set out the procedure for the appointment of directors and/or managers. For instance, they may wish to allow each shareholder to appoint and remove their own directors and consideration of Corporations Act 2001 (Cth) requirements may become relevant.

Quorum

In the case of an incorporated joint venture, the requirements for quorum of meetings of the shareholders and directors are generally set out in the entity's constitution. However, depending on the jurisdiction, it may be possible to further restrict the quorum requirements. This would be particularly useful for board meetings where each shareholder has nominated their own directors and the parties intend that each shareholder be represented in every decision of the board.

Passing Resolutions

Likewise, the percentage approval required for passing a resolution is also usually set out in the company's constitution. However, depending on whether they are permitted to do so in the relevant jurisdiction, the parties may seek to amend this percentage and/or to provide for different percentage thresholds, depending on the type of resolution in question.

Chairman

The parties may also decide the method of appointing the chairperson of the board of directors and whether the chairperson should have a casting vote on decisions of the board in the event of deadlock.

Reserved Matters

The parties may wish to reserve certain matters either for the approval of a higher majority of shareholders or for unanimous approval by the shareholders. Such reserved matters will require consideration of local law requirements and may include:

(a) altering the constitution of the company;

(b) approving the registration of a new shareholder of the company;

(c) increasing the share capital amount of the company;

(d) granting any option or other interest over or in the shares held by a shareholder;

(e) redeeming or purchasing any of the shares held by a shareholder;

(f) passing any resolution for the liquidation of the company or presenting any petition for its administration (unless it has become insolvent);

(g) altering the name, registered address or principal place of business of the company;

(h) adopting or amending the business plan;

(i) changing the nature of the company's business or commencing any new business by the company which is not ancillary or incidental to the existing joint venture;

(j) forming any subsidiary or acquiring shares in any other company or participating in any partnership or joint venture;

(k) amalgamating or merging with any other company or business undertaking;

(l) making any acquisition or disposal by the company of any material asset(s);

(m) creating or granting any encumbrance over the whole or any part of the joint venture, undertaking or assets of the company or over any shares in the company or agreeing to do so;

(n) borrowing money;

(o) lending money (otherwise than by way of deposit with a bank or other institution the normal business of which includes the acceptance of deposits or in the ordinary course of business), granting any credit (other than in the normal course of trading), or giving any guarantee (other than in the normal course of trading) or indemnity;

(p) altering any mandate given to the company's bankers relating to any matter concerning the operation of the company's bank accounts;

(q) entering into any arrangement, contract or transaction outside the normal course of its business or otherwise than on arm's length terms;

(r) giving notice of termination of any arrangements, contracts or transactions which are material in the nature of the company's business, or materially varying any such arrangements, contracts or transactions;

(s) adopting or amending any standard terms of business (including prices) on which the company is prepared to provide goods or services to third parties;

(t) granting any rights (by licence or otherwise) in or over any intellectual property owned or used by the company;

(u) factoring or assigning any of the book debts of the company;

(v) changing the auditors of the company or its financial year end;

(w) making or permitting to be made any change (or material change) in the accounting policies and principles adopted by the company in the preparation of its audited and/or management accounts except as may be required to ensure compliance with the relevant statutory provisions;

(x) declaring or paying any dividend that exceeds a certain percent of the company's distributable profits as shown by the audited accounts for that year, or making any other distribution out of the company's distributable profits or any of its reserves; and

(y) establishing or amending any profit-sharing, share option, bonus or other incentive scheme of any nature for directors or employees of the company.

Likewise, the parties may wish to reserve certain management decisions for unanimous approval by the board of directors, such as the following:

(a) dismissing any director, officer or employee of the company in circumstances in which the company incurs or agrees to bear redundancy or other costs in excess of a certain specified amount;

(b) agreeing to remunerate (by payment of fees, the provision of benefits-in-kind or otherwise) any officer of or consultant to the company or increasing the remuneration of any such person to a rate in excess of a certain specified amount;

(c) entering into or varying any employment agreement providing for the payment of remuneration or increasing the remuneration of any staff to a rate in excess of a certain specified amount; and

(d) instituting, settling or compromising legal proceedings (other than debt recovery proceedings in the ordinary course of business) instituted or threatened against the company or submitting to arbitration or alternative dispute resolution any dispute involving the company.

External Management

The parties may also wish to appoint either an external company or one of the parties to be responsible for the management of the joint venture company. Where such a scenario is envisaged, the company should enter into an appropriate management agreement with the entity which is to be appointed to manage the company.

14. How will disputes be resolved?

It is common for a joint venture agreement to contain a provision determining the method of dispute resolution that shall be adopted by the joint venture parties to overcome and resolve disputes that may arise.

If a dispute reaches a stage where the joint venture parties are unable to come to an agreement between themselves and the parties are faced with a potential termination of the joint venture agreement, there are a number of options that can be considered to resolve the dispute. Which dispute resolution mechanism is appropriate can depend on the circumstances and the preferences of the joint venture partners themselves.

Some methods of dispute resolution that are considered for joint venture agreements include the following:

Buyout

In some instances, a joint venture party may wish to terminate the relationship by acquiring the other parties' interests. If this method is adopted, usually certain key matters will be identified as matters upon which a deadlock may arise. If a deadlock has occurred, the first step is usually for each of the parties to meet to discuss the issues and attempt to resolve the deadlock. However, if the deadlock is unable to be resolved, the joint venture parties may seek to terminate the relationship and end the joint venture.

There are many forms of termination provisions in deadlock situations. Some of the more common methods are set out below, which generally relate to the incorporated joint venture scenario.

(a) Texas shoot-out

A 'Texas shoot-out' provision is where the joint venture parties are invited to submit a sealed cash bid to the company stating the price at which they would be willing to buy the shares of the other joint venture party. Once all bids are received, the bids are opened and the highest bidder must buy the other joint venture party's shares in the capital of the joint venture company. This form of provision is intended for a two-party relationship but can be modified to suit a joint venture where there are three or more parties.

(b) Russian roulette

A 'Russian roulette' provision is where one of the joint venture parties serves notice on the other joint venture party of their intention to buy their shares for a specified price. Upon receipt of such notice, the recipient party may choose to either accept the offer or issue notice of a counteroffer to purchase the former party's shares at a specified higher price. Upon receipt of a higher price offer, each joint venture party has the option to issue counteroffers at a higher price until the highest price is obtained. Again, this termination mechanism is also designed for two-party joint venture relationships but can be modified to suit a joint venture where there are three or more parties.

(c) Dutch auction

A 'Dutch auction' provision is a variation on the Texas shoot-out method and involves each of the joint venture parties being required to submit a sealed bid stating the minimum price at which they would be willing to sell their shares to the other joint venture party. The party that has submitted the highest price at which they would be willing to sell their shares shall be required to purchase the other party's shares at whatever price such other joint venture party stated that they would be willing to sell their shares. This termination mechanism can also be adjusted to suit a multiple joint venture party scenario.

Mediation

The parties may attempt to resolve a dispute by mediation before resorting to more formal methods of dispute resolution. Mediation mechanisms require the joint venture parties to meet and attempt to resolve a dispute under the facilitation of an impartial mediator.

Arbitration

Arbitration is a dispute resolution process that has grown significantly at an international level. It essentially provides that a third party considers the joint venture dispute following submissions and imposes a decision that is legally binding on all parties. There are a number of arbitration centres domestically and internationally that can assist the parties administer the arbitration process and their respective rules are often referred to in joint venture agreements as becoming applicable in dispute proceedings.

There are a number of benefits of applying arbitration as a dispute resolution mechanism. For example:

(a) it can be a more efficient and expeditious process, as it is a less formal procedure than court;

(b) arbitrators are usually specialists on the points of law that are relevant to the dispute; and

(c) the joint venture parties can choose the arbitrators.

Although arbitration awards are binding on the parties and are generally enforceable by the courts, there are circumstances in which an arbitral award can be challenged depending on the jurisdiction in which the enforcement of the award is being undertaken.

Litigation

The parties may choose to resolve joint venture party disputes by going to court. If this is the case, it is recommended that the parties agree on the jurisdiction that will govern the contractual relationship of the parties in advance in the joint venture agreement.

Liquidation

In many cases, a joint venture relies on the specific expertise of both parties. Where this is the case, and where the relationship between the joint venture parties breaks down, it is often not in the best interests of the parties for one of the joint venture parties to buy out the other. Nor is it in the interest of the joint venture parties to continue to operate where the relationship has broken down to the point that arbitration or litigation is required to resolve the deadlock.

In such a scenario, the joint venture parties may wish to dissolve the joint venture by opting to liquidate and wind up the affairs of the joint venture entity.

15. Will any of the parties have an option to buy or sell shares/interests in the venture?

The joint venture parties may wish to require an option to either buy or sell shares in the capital of the company from or to the other joint venture party or parties at a later date for a certain price. This generally requires clear agreement drafting to avoid a later dispute over pricing of the joint venture when such options are enacted.

16. Will there be any restrictions or obligations regarding transfer of shares/interests?

Obligatory Transfer Events

The joint venture parties may wish to insert a provision in their agreements that requires a joint venture party to transfer its shares to the other joint venture party or parties upon the occurrence of certain events, including:

(a) a change of control of a joint venture party;

(b) a joint venture party or any other company in a party's group being unable to pay its debts as they fall due;

(c) any process being instituted that could lead to a joint venture party being dissolved and its assets being distributed among that joint venture party's creditors, shareholders or other contributors;

(d) a joint venture party ceasing to carry on its business or substantially all of its business; and/or

(e) a party committing a material or persistent breach of the joint venture agreement and any other key agreements, and failing to remedy such breach if required to do so.

If such a provision is to be adopted, the joint venture parties may also need to establish the method of setting the price at which the shares are to be sold to the other parties associated with the joint venture. The most common form of setting such a price is agreeing to the appointment of an independent third-party valuer to establish the fair value market price at the time of transfer.

Drag-along and Tag-along Rights

The joint venture parties may also wish to provide tag-along rights to minority shareholders whereby, in the event of a majority shareholder selling their joint venture company shares to a third party, the minority shareholders would have the option to sell their shares at the same price to the same third party.

A tag-along right may also be required where the joint venture relies on the specific expertise of one of the parties. In such a case, where the joint venture party with the specific expertise on which the joint venture relies seeks to transfer its shares to a third party, the other joint venture party may wish to be granted a tag-along right which would allow it to sell their own shares on the same terms to the same third party.

Similarly, the joint venture parties may wish to provide drag-along rights to the majority shareholder whereby, in the event of a majority joint venture shareholder selling its shares to a third party, the majority shareholder would have the option to require the minority joint venture partner to sell its shares at the same price to the same third party.

Other Transfer Restrictions

The parties may wish to include a provision in the joint venture agreement which prevents any of the parties from selling its shares for a certain period or the joint venture parties may wish to provide that the shares shall not be sold for a consideration price of less than a certain amount.

17. Are the terms of the joint venture confidential?

It is common for an investment agreement, shareholders' agreement or joint venture agreement to include a clause requiring the joint venture parties not to disclose any confidential information obtained in relation to each other and the venture to third parties.

The issue of any public announcements is also generally agreed between the joint venture parties, including its timing and content.

18. Should the parties be restricted from competing with the venture?

The joint venture parties may wish to add a provision to the joint venture agreement requiring that the joint venture parties refrain from competing with the business of the joint venture for a certain period after ceasing to hold an interest in the venture.

19. Are the terms of the joint venture confidential?

It is recommended that the joint venture parties agree at the outset who shall bear the costs of incorporating the joint venture company. Usually, such costs are shared by the joint venture parties according to the respective proportionate interests in the venture.

20. Are there any applicable regulatory restrictions?

Anti-money laundering and Anti-bribery Laws

It is important to ensure that sufficient information in relation to the background of the joint venture parties and the funds to be contributed to the joint venture is obtained in order to ensure that entry into the joint venture with such parties will not breach any applicable anti-money laundering or anti-bribery laws. Those in Australia should take note of the new anti-money laundering and counter-terrorism financing laws commencing in July 2026.

International Sanctions

If any of the joint venture parties are connected to any countries which are subject to international sanctions (for example, Russia), or if it is intended that the joint venture will operate in or trade with such countries, the joint venture parties should seek legal advice to ensure that undertaking the venture will not breach any of the applicable sanctions.

Anti-competition Laws

The parties should ensure that the proposed projects of the joint venture will not breach any applicable anti-competition laws.

Other Regulatory Issues

There are various other restrictions which may apply depending on the nature of the joint venture which is to be undertaken and the regulatory environment in which the joint venture operates.

21. Will the venture be subject to tax?

The joint venture parties should consider the tax implications of the venture at the outset. While joint venture companies will generally be taxed in their home jurisdiction, there may also be tax implications where the joint venture intends to operate in other jurisdictions, and where any of the joint venture parties is a foreign registered corporate entity.

22. Will management or employee incentives be provided?

The joint venture parties may wish to consider offering performance-based incentives to managers or employees associated with the joint venture, such as share bonuses upon the achievement of certain milestones.

If such managers or employees are parties to the joint venture, such incentives could be described in the relevant joint venture documentation. Otherwise, if the managers or employees are not parties to the joint venture, such incentives ought to be documented separately and with careful consideration of employment laws and tax regulations.

ABOUT THE AUTHOR

Ben Constance is a partner in the Melbourne office of Holding Redlich where he specialises in M&A, company governance and general commercial law.

His M&A and corporate experience includes public and private mergers and acquisitions, restructures as well as joint ventures, often with a cross-border element. His capital markets background extends to initial public offerings and secondary capital raisings (rights issues and placements) as well as acting for issuers, sponsors and underwriters. He has advised on M&A deals and corporate transactions in Australia, Asia, and throughout the Middle East in various sectors including banking and financial services, hospitality, technology, real estate and construction, agriculture and energy/renewables.

Before joining Holding Redlich, Ben was a partner at a number of international law firms in Asia and the Middle East, as well as working with a number of large national corporate law firms in Australia.

Ben studied law at the University of Canberra. He was admitted to the Supreme Court of Australian Capital Territory and High Court of Australia in 2002.

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