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**INDIGENOUS
JOINT
VENTURES**
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INFORMATION GUIDE

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Note: This paper provides general information only. If you require legal advice about a matter, please consult a lawyer.

1. BACKGROUND

The Australian Government is committed to supporting Indigenous economic development and encouraging Indigenous participation in business through a number of policies and programs. The Commonwealth's Indigenous Procurement Policy (IPP) resulted in Commonwealth Government contracts for the delivery of goods and services worth over \$1 billion awarded to Indigenous businesses since the policy commenced in July 2015.

This information guide provides general advice and practical tips about joint ventures to assist Indigenous businesses and organisations seeking to enter into these arrangements. In this guide, we consider the following legal and cultural issues relating to Indigenous joint ventures:

- The nature of Indigenous businesses and joint ventures;
- Due diligence – choosing potential partners and understanding values and contributions; and
- Working together – different ways of partnering up and structuring joint ventures, issues related to governance (controlling and running joint ventures).

2. WHAT IS AN INDIGENOUS BUSINESS?

The term 'Indigenous enterprise' is defined in the Indigenous Procurement Policy as a business that is 50 per cent or more Indigenous owned.¹ This includes a Supply Nation certified business at 51% Indigenous ownership and Indigenous Business Direct registered businesses at 50% Indigenous ownership.² 'Indigenous' refers to a person who is an 'Aboriginal' and/or 'Torres Strait Islander' person.

2.1 Registered vs certified Indigenous business enterprises

Registered Indigenous business enterprises are those that are 50% Indigenous-owned and are registered with Indigenous Business Direct.

They have been verified by Supply Nation and are approved and published online on the Indigenous Business Direct register. To register on Indigenous Business Direct, an Indigenous enterprise must:

- i. be 50% owned by Indigenous Australians; and
- ii. provide Indigenous Business Direct with accepted documentation evidencing this Aboriginality.

Certified Indigenous business enterprises are 51% or more *Indigenous-owned, managed and controlled*. It sets a higher standard for Indigenous ownership and is the definition and criteria for an "Indigenous business" endorsed by Supply Nation. These are the Indigenous businesses that use the Supply Nation logo as an identifier. They have also been verified by Supply Nation and are approved and published online on the Indigenous Business Direct register.

Supply Nation Certification

To be a Certified Indigenous business, the following criteria must be met by the business:

- i. at least 51% owned by Indigenous Australians;
- ii. led and/or managed by a Principal Executive Officer who is an Indigenous Australian;
- iii. controlled by an Indigenous Australian who makes the key business decision regarding the company's finances, operations, personnel and strategy;
- iv. for profit;
- v. trading as a business with a minimum annual revenue of \$50,000.00 or a demonstrated recent history of trade (within at least the last 6 months' trade history); and
- vi. located in Australia.

Supply Nation will notify registered business enterprises if they are eligible.

Confirmation of Aboriginality can be provided to Supply Nation in one of two different forms:

- confirmation of Aboriginal or Torres Strait Islander descent (provided by a recognised Aboriginal and/or Torres Strait Islander institution); or
- a statutory declaration (which is legally binding, of which false and misleading statements are punishable under section 136 of the *Criminal Code Act 1995* (Cth) and section 11 of the *Statutory Declaration Act 1959* (Cth)).

¹ Commonwealth Indigenous Procurement Policy, section 1.6.

² Commonwealth Indigenous Procurement Policy, section 6.

3. WHAT ARE JOINT VENTURES?

Businesses often work with other businesses to share their resources, skills or expertise with one another, to create a mutual benefit. Sometimes this arrangement is project-specific, and other times this can be ongoing partnerships to work together for common long-term goals. This is referred to as a 'joint venture'.

3.1 Benefits of joint ventures

Joint ventures are a common way for Indigenous businesses to enter the government supply chain, particularly where they are smaller businesses and on their own, they may not have capacity to carry out large projects.³ It can also be useful where a business wants to enter a new market, one where they do not have an established reputation to bid on their own, as it allows the opportunity to work with larger, more established companies and gain entry into that market.

3.2 Potential pitfalls of joint ventures

With the growth of the Indigenous business sector and economic development initiatives, the issue of Indigenous ownership in business and black cladding has received attention. Black cladding is the unethical practice of non-Indigenous businesses passing themselves off as Indigenous businesses in order to benefit from Indigenous policies and programs.⁴

Initiatives such as the IPP and the Community Development Programme are created to build a strong, diverse and self-supporting Indigenous business sector in a way that is empowering to Indigenous people and involves Indigenous communities. The aim of the IPP, for example, is to "stimulate Indigenous entrepreneurship and business development, providing Indigenous Australians with more opportunities to participate in the economy".⁵ Black cladding significantly undermines these aims and objectives, taking away the benefit intended for Indigenous people.

3.3 Types of joint ventures

There are different ways of structuring joint ventures; they can be incorporated or unincorporated. Indigenous businesses should be clear on what the differences are as it comes with different levels of responsibilities and obligations.

Joint venture models are discussed in more detail in Part 5 of this information guide. It is very important for Indigenous businesses to carefully consider the different options, do their research and seek advice before agreeing to partner up with other businesses.

³ Law Way Workshop, Terri Janke and Company Pty Ltd.

⁴ Andrew Burrell, 'Beware 'black cladding' as indigenous vie for business' The Australian <<http://www.theaustralian.com.au/national-affairs/indigenous/beware-black-cladding-as-indigenous-vie-for-business/news-story/f7ebea079f6ca57fc00a20c021c0ac3c>>.

⁵ Commonwealth Indigenous Procurement Policy 2015, s 1.1.

4. HAVE YOU DONE YOUR DUE DILIGENCE?

Before deciding to work with other businesses in a joint venture, it is very important to have preliminary conversations and take reasonable steps to evaluate whether doing so would be the right choice, or if a potential joint venture partner is the right fit.

This process is called 'due diligence'. Conducting due diligence will help ensure that the businesses thinking of entering into a joint venture are on the same page and build strong foundations for the joint venture.

Amongst other things, there should be clear and defined objectives for the joint venture, an understanding of each other's intentions, contributions, roles, cultures and values. Armed with this knowledge, Indigenous businesses are able to look after their own interests and make more informed decisions about entering into joint venture arrangements.

Some key considerations businesses should consider before partnering up include:

- i. **Identify the opportunity:** Is there an opportunity where teaming together with another business could increase the chances of getting a successful outcome? Is it a short term or a long-term opportunity?
- ii. **Analyse your capabilities to meet the opportunity:** What can you bring to the table? Can you meet the requirements of the new opportunity without compromising existing customers/business? What are the gaps in meeting those requirements? Do you need to obtain capacity from outside your business? Where does the joint venture fit into the picture?
- iii. **Identify suitable collaboration partners:** What are you looking for in a joint venture partner? Are your values and culture aligned with theirs? How well do you know them?⁶ What is the potential joint venture partners' commitment to Indigenous engagement? E.g.: do they have a Reconciliation Action Plan? What is their past track record of working with Indigenous people?
- iv. **How will the partners of the JV be remunerated?** What is the business model and strategy? Is there a financial forecast for future income? How will the Indigenous JV benefit financially from the arrangement?

Many problems that arise with joint ventures arise from failing to discuss these issues, so having these discussions early in the process before any agreements are signed could save a lot of time, money and headaches in the future. Further, outcomes of the due diligence process will then help inform the formation and foundations for the joint venture.

See **Appendix A** for a template due diligence checklist to assist with preliminary discussions.

⁶ Government of South Australia, 'A Guide to Business Collaborative Contracting', <http://www.statedevelopment.sa.gov.au/upload/small-business/guide-to-business-collaborative-contracting.pdf>, page 11.

5. HOW COULD JOINT VENTURES WORK?

Below are some joint venture models that Indigenous businesses thinking about joint ventures could consider.

Note, however, that the appropriate structure will ultimately depend on the purpose of the intended relationship (ie the nature of the project(s)), how long the arrangement is contemplated to exist, and the intention of the parties.⁷

5.1 Unincorporated joint ventures

Unincorporated joint ventures are joint venture arrangements based on contractual agreements. There is no specific law that regulates unincorporated joint ventures. The businesses involved in the joint venture do not create a new company and instead rely on a written contractual agreement to define the joint venture arrangements.

The advantages and disadvantages of using an unincorporated joint venture are summarised in the following table:

Advantages	Disadvantages
<p>Flexibility. Structure offers flexibility, JV partners are able to run and conduct their businesses independently.</p>	<p>Risk that JV may be classified as a partnership if agreement not properly drafted – partnership gives rise to fiduciary duties and joint & several liability.</p> <p>Unincorporated JV not a separate entity – cannot enter into contracts on its own (one or all of JV partners must enter into contracts for the JV).</p>
<p>Administration. Less complex and less formalities/administration required to set up and run than a company.</p>	<p>Unincorporated JVs are not legal entities – relies on a well drafted JV agreement. No specific law to regulate.</p>
<p>Control. Can offer high level of control over decision-making to Indigenous parties – parties can structure management and control of the JV however it sees fit (ie structured as agreed under the JV agreement, no board of directors/ compliance with director’s duties as with companies).</p> <p><i>E.g. If the Indigenous business is the head contractor, can allow more Indigenous control and management over contract and delivery.</i></p>	<p>Cannot be certified by Supply Nation.</p> <p>If Indigenous business is the head contractor, depending on the size of an awarded contract, significant resources and expertise may be needed to manage the contract and the subcontractors (e.g. deliverables, deadlines, performance levels, payments, etc.).</p>
<p>Liability. Parties are only liable for their share and contributions to the project, unless specified in the agreement.</p> <p><i>E.g. If the Indigenous business is the subcontractor, liability is limited to the terms of the subcontract.</i></p>	<p>Subcontractors generally have no direct control/link to the client. Subcontractors do not have rights to go after the client and sue if there is a dispute (e.g. for non-payment) – doctrine of privity.</p>
<p>Income and tax considerations. JV partners can set</p>	

⁷ Law Way Workshop, Terri Janke and Company Pty Ltd.

proportions of income as it sees fit in the JV agreement. Tax considerations are accounted for on an individual basis and not dependent on the JV partners – not subject to company tax.	
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5.1.1 Unincorporated JV agreements: protect Indigenous interests

Indigenous businesses may choose to work with non-Indigenous businesses under an unincorporated joint venture model. This may be due to the ease and flexibility offered by this structure compared to the complexities involved with setting up a company.

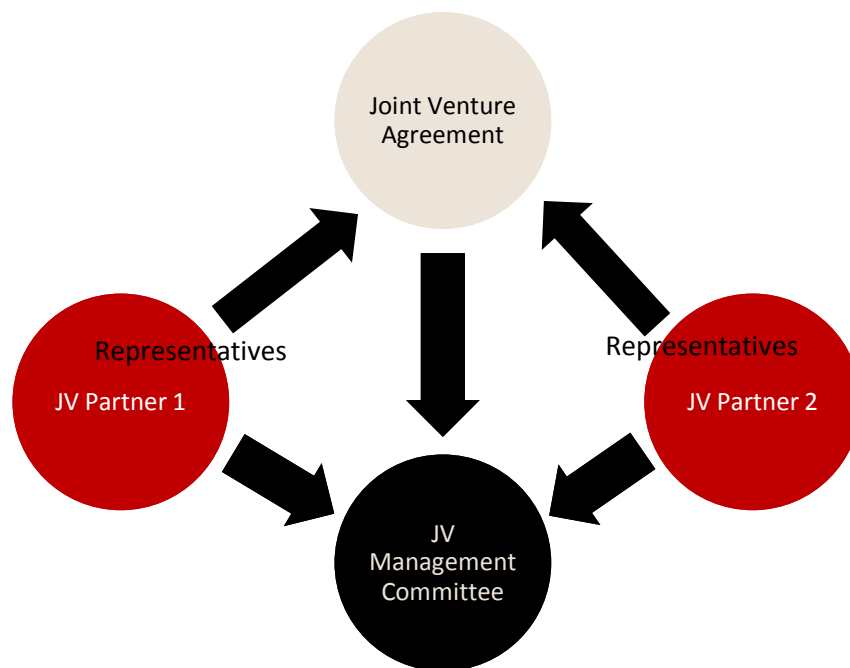


Figure 2: Unincorporated joint venture model.

In an unincorporated joint venture, the contractual agreement sets out the terms of the relationship such as the roles of each party to the joint venture. The management committee has overall control and management of the joint venture.

Indigenous control and management of an unincorporated joint venture could be demonstrated by requiring in the joint venture agreement:

- That the joint venture’s management committee must have 50% or majority Indigenous representation;
- Nominating an Indigenous person to chair the management committee; and

- Giving chair voting rights in the event of deadlocks.

Key elements of an unincorporated joint venture agreement are outlined in **Appendix A**. Joint venture agreements can sometimes be referred to using other terms such as ‘teaming’, ‘collaboration’ or ‘alliance’ agreements.

5.1.2 Subcontracting arrangements

The joint venture agreement of an unincorporated joint venture could also set out and address subcontracting arrangements between the joint venture partners. Subcontracting is a business practice where the main or head contractor hires additional individuals or companies (the ‘subcontractors’) to help them complete their contracted work.

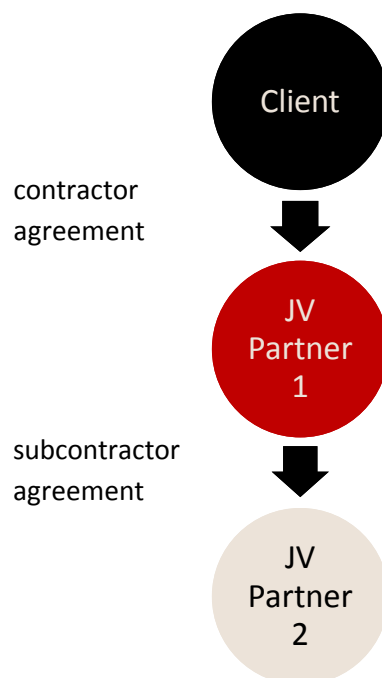


Figure 3: Subcontracting model.

Subcontracting is a common way for parties of an unincorporated joint venture to work together, particularly with government contracts. Often the preliminary or general terms of a subcontracting arrangement are also pre-agreed by the parties in the joint venture agreement.

Indigenous businesses partnering with non-Indigenous businesses can consider the following subcontracting models:⁸

- i. The Indigenous business enterprise could enter into an agreement with a client (the ‘head contractor’) as the main contractor to do the work, and subcontracts part of the work to another business (‘the subcontractor’); or

⁸ Law Way Workshop, Terri Janke and Company Pty Ltd.

- ii. The non-Indigenous business enters into the head contract with the client as the head contractor to do the work, and the Indigenous business is brought in as a subcontractor in a subsequent agreement with the head contractor to perform part of the work (ie as a consultant).

Managing subcontracting relationships can become tricky. A head contractor is bound to deliver on the terms of its contract with the client, and disputes usually arise when what the client requires and what the subcontractors deliver do not match. Some tips to avoid this situation are:

- i. **Discuss subcontracting arrangements early** – parties should consult with each on the subcontracting arrangements while the head contract is being negotiated and not after the head contract is finalised. This will avoid misunderstandings about what is expected by the client from the head contractor and its subcontractors. This will also give subcontractors an opportunity to negotiate the terms of the subcontractor agreement.
- ii. **Write down the arrangement in a contract** – the contract should contain the roles and responsibilities of each party, the expectations and project requirements. It is important to make sure that the rights and responsibilities in the main head contract with the client flow through and are also reflected in the subcontract. Often the general terms of a subcontracting arrangement are addressed and agreed to early in the JV agreement (or teaming or collaborative agreement) that set out how the parties agree to run the unincorporated joint venture in anticipation of contracts being awarded.
- iii. **Keep communication channels open** – provide information as early as possible throughout the project.
- iv. **Meet regularly** – discuss any updates and concerns at regular (quarterly, monthly) meetings.

5.2 Incorporated joint ventures

Incorporated joint ventures are joint venture arrangements where a new company, a separate legal entity, is created. The new entity will be subject to *Corporations Act 2001* (Cth) (Corporations Law). The businesses involved in the joint venture own and take up shares in the new company, which conducts the joint venture operations and is managed through its board of directors.

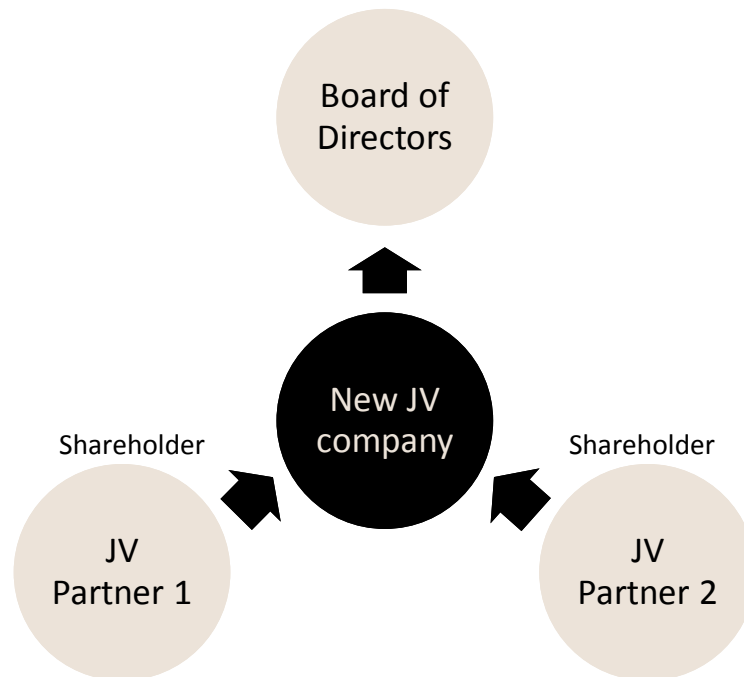


Figure 1: Incorporated joint venture model.

The joint venture company is a separate limited liability company owned by the joint venture partners as shareholders. The shareholders have agreed shareholdings to the company in certain percentages, as agreed to in a shareholders agreement. The shareholders also nominate directors to the company board, which has overall control and management of the joint venture.

The joint venture company owns all the assets of the business. It is regulated by corporations law and conducts business activity as a separate entity, strategically governed by its board of directors. The joint venture company structure can be found in:

- i. **The company constitution** – and/or provisions of the *Corporations Act 2001* (Cth) that apply to the company as ‘replaceable rules’; and
- ii. **The shareholders agreement** – an agreement between the companies’ shareholders that sets out the relationship between the shareholders – their rights, responsibilities and liabilities. This can be powerful in protecting Indigenous interests in the company.

The advantages and disadvantages of using an incorporated joint venture model are summarised in the table below:

Advantages	Disadvantages
<p>Legal entity. Separate legal entity carries out the JV, governed by established corporations law principles.</p> <p>Carries out work and enters into contracts in its own right.</p>	<p>Offers less flexibility than an unincorporated JV, which is established through a contract and structured by the JV partners as they see fit.</p>
<p>Administration and control. Rules of administration/running a company and governance structures by a board of directors are clearly set out in corporations law.</p> <p>JV can be certified by Supply Nation (if requirements are met).</p>	<p>Complying with laws generally more complex and resource/cost-intensive than an unincorporated JV. Serious consequences for non-compliance.</p> <p>Ongoing costs of running a company can be high.</p>
<p>Liability. As a separate legal entity, company has separate liability and shareholders have limited liability.</p>	<p>Company officers owe personal duties under the Corporations Act 2001 (Cth) (e.g. directors duties) and common law principles – to act in the best interests of the JV company, which might not the same as interests of its shareholders.</p>
<p>Income and tax considerations. JV company income can be distributed to shareholders through shares – company structure can offer flexible structuring (ie differential rights, preferential shares)</p>	<p>JV company must pay company tax (current base rate – 27.5%) on income before it can be distributed to shareholders. This rate may change in the future, current tax rates can be found on the ATO website.</p> <p>Share classes can be open to unwanted exploitation if shareholders agreement or constitution not drafted with Indigenous interests in mind – e.g. majority Indigenous shareholding but Indigenous parties not obtaining majority financial benefit due to share structures, or profits distributed to Indigenous shareholder with no understanding of exchange/value for contribution.</p>

5.2.1 Indigenous owned, managed and controlled JV

Issues that arise for incorporated joint ventures usually revolve around how the Indigenous party can establish and maintain **Indigenous ownership, management and control** of the joint venture company. This is important to ensure benefits flow back to the Indigenous JV company.

Safeguarding Indigenous interests – shareholders agreement

Indigenous ownership of a company is reflected in the ownership of company shares by Indigenous people or businesses. A shareholders agreement is a particularly useful way of providing guidance and clarifying Indigenous ownership of a company by specifically defining the rights, decision-making powers and obligations of Indigenous parties when a company is used as a vehicle to create an Indigenous business.

The shareholders agreement can also be drafted to ensure that majority of the financial benefit/company income is being received by the majority Indigenous shareholder(s).

Although not required by the Corporations Act, it serves to fill the gaps in the areas and issues not covered by the Corporations Act or the company's constitution.

Shareholders, while they are the owners of a company, are not responsible for making decisions and running the company (unless the shareholder is also a director or hold a role within the company that gives control and management duties). The company's operations are governed by its board of directors.

Indigenous shareholders who are not directors of the company may not be able to influence strategy and key business decisions which can impact the profitability of the company. Furthermore, only directors make decisions about when dividends are paid. For example, a joint venture company with 50% of its shares owned by an Indigenous business potentially faces black cladding issues if it is unclear what the Indigenous parties' role is in the company, or if decisions are made by the non-Indigenous parties and there is no Indigenous representation at executive/board level.

If the intention is for an Indigenous owned, managed and controlled JV to be certified by Supply Nation, please be aware that more rigorous standards through additional control and independence tests are applied.

Supply Nation and Indigenous joint ventures – commercial independence and control

To be certified, Indigenous joint ventures must demonstrate that it is 'commercially independent'. This means that the joint venture must:

"reflect a collaboration of the JV parties resources, skills and assets and not totally or fundamentally depend on non-commercial relationships and use of resources (e.g. equipment, personnel, facilities, financial or bonding support) with another non-Indigenous enterprise or enterprises to deliver its core service offering(s)".⁹

⁹ Supply Nation, *Joint Venture Certification Criteria*, <http://supplynation.org.au/media/1153/supply-nation-jv-certification-criteria.pdf>.

Supply Nation requires Indigenous joint ventures to meet certain factors to determine commercial independence, including:

- evidence of a shareholders' agreement and constitution setting out Indigenous control and management of the joint venture. This may be by requiring in the shareholders agreement and constitution:
 - That company must always have majority Indigenous shareholding;
 - A minimum quorum consisting of majority Indigenous shareholding percentage at shareholders' meetings;
 - Voting rights correspond to shareholding;
 - Protecting Indigenous shareholders in the event of deadlock; and
 - For certain matters to require consent from Indigenous parties e.g. special resolution.
- Indigenous control at board and executive level. This may be by requiring in the shareholders agreement and constitution:
 - A minimum number or percentage of Indigenous directors on the company board;
 - A minimum quorum consisting of majority Indigenous directors at directors' meetings; and
 - The board chair to be Indigenous, with a casting vote to resolve deadlocks.
- independent brand and financial controls from its parent businesses, and
- agreements with non-Indigenous partners if resources are shared or accessed. This may be through service agreements, employment agreements or facilities/shared services agreements with the non-Indigenous partners.

Indigenous control and management should be reflected in the joint venture company's structure.

Indigenous parties to a joint venture company must have clear roles, rights, decision-making powers and responsibilities demonstrating Indigenous control in the company's operations.

Setting solid foundations

When entering into joint ventures, it is important to get proper advice from qualified legal practitioners to assist you establish your legal and governance framework. This will include drafting JV agreements, shareholder agreements and other legal documents. Once developed, it is important to manage the compliance of the JV to the agreed legal and governance framework. This can be addressed by establishing project management processes; regular meetings with recorded decisions and good communication protocols between the JV partners. Good project management practices can deflect complications before they escalate.

Summary

Joint ventures are particularly useful for smaller or growing Indigenous businesses as it is a way of partnering with other businesses to build capacity, tap into new networks, have access to larger pools of resources and build relationships to grow the business.

However, while joint ventures open up opportunities and encourage Indigenous economic participation, they do not come without risks. Without strong foundations and an understanding of the rights, responsibilities and risks that come with joint ventures, less experienced Indigenous businesses may become more vulnerable to exploitation.¹⁰

Careful consideration of the potential joint venture partners, and an assessment of the benefits and risks is needed before entering into a joint venture.

¹⁰ Law Way Workshop, Terri Janke and Company Pty Ltd.

APPENDIX A – DUE DILIGENCE CHECKLIST

Joint Venture – Due Diligence Checklist	Action Items /Comments
Values and People	
Who is your JV partner? Understand what their drivers are, what is important to them, and their vision. How long have they been operating?	
Do your values and philosophies align closely with your JV partner's? Do you trust them?	
Does the JV partner have a good track record of working with Indigenous businesses? Consider seeking advice from others. <i>For example:</i> <i>Does the JV partner engage Indigenous employees/contractors?</i> <i>Does the JV partner have a Reconciliation Action Plan? An Indigenous Engagement Policy? A Diversity Plan?</i> <i>Is the JV Partner a Supply Nation member?</i>	
Have you spoken to your JV partner about Supply Nation certification requirements (51% owned and managed by Indigenous Australians?)	
Do you understand your JV partner's operating culture? Do you match in your approach to clients, projects and pursuits?	
Has your JV partner clearly identified their object for collaboration? What is the JV hoping to achieve?	
Prepare Business Case	
Do you have a list of what value you bring to the joint venture? <i>For example:</i> <ul style="list-style-type: none"> • Business contacts • Intellectual property, Indigenous Cultural and Intellectual Property • Opportunities under Indigenous procurement/programs • Supply Nation and Aboriginal Business Directory registration • Management skills • Workforce Once you have your business case, use this to push for the outcomes that you want (e.g. to own, manage and control the JV).	

<p>Do you understand what you bring to the table? Exactly what role you have in the JV and what do you want to get out of the JV? <i>For example:</i></p> <ul style="list-style-type: none"> • Can you deliver what you are promising? • Have you clearly defined what you will be required to deliver and how much it will cost you? • Are you adequately compensated for your involvement in the JV? 	
<p>What is your current capacity? Are there gaps and can the JV fill these gaps?</p>	
<p>Discussion</p>	
<p>Key issues to be discussed with your JV partner:</p> <ul style="list-style-type: none"> • What are the goals of the JV? • What are the objectives of each business partner? • How much will the JV be intending to make? • How much will the parties be investing? Who will fund the JV? • What assets & expertise will each party be putting in? • What is the project? • Who is managing the project/company (At least 50% Indigenous control?) • What will be the decision-making process – e.g. directors and board decision making (At least 50% Indigenous control) • What is the business model? How will the partners receive financial returns? • How will disputes be resolved? • Will the JV company be registering a business name/trade mark? • What IP will each joint venture partner be bringing to the project? How will IP created as part of the JV be owned and used? • How will you and the JV Partner communicate (what is the plan?) • What is the JV’s plan and targets for Indigenous training, engagement, community contributions or capacity building? How will these be measured? <p>Make sure you are clear on the terms of the collaboration, who will provide what, and how you will work together.</p>	

APPENDIX B – UNINCORPORATED JV AGREEMENT: KEY ELEMENTS

An unincorporated joint venture is based on a contractual agreement between the businesses involved on how they intend to work together using their existing business structures, without creating a new entity.

It is important for this arrangement to be recorded in a written joint venture agreement so the parties' expectations of one another are clearly articulated. These agreements generally cover the following terms and issues:¹¹

1. **Objectives** - this should clearly identify:
 - a. **Purpose of the JV**
 - b. **The nature/structure of the JV:** is it a head contractor/subcontractor relationship?
 - c. **The scope of relationship:** the intended scope of the collaboration between the parties (e.g. is it only for bidding for a specific contract?) including a clear statement of work.
 - d. **Exclusivity:** whether the collaboration is exclusive or not exclusive in nature.
2. **Parties to the JV**
3. **Duration** – when/for how long will the JV operate?
4. **Roles and responsibilities**
 - a. Before the project
 - b. Carrying out the project –
 - i. General obligations of all parties
 - ii. Specific roles of each party.
 - iii. What do the parties agree about entering into a subcontracting agreement?
Provisions such as:
 - Head contractor cannot enter into the head contract unless it also enters into the subcontractor agreement
 - A subcontract must be negotiated in good faith
 - a. Suggest terms to be contained in the subcontract e.g. scope of work, payment terms (how and when).
 - That the terms of the subcontract will, as far as possible, be consistent with the proposal and the head contract, and obligations to be imposed on the subcontract will mirror the obligations and duties imposed under the head contract
5. **Project Management** – responsibilities around communication and management throughout the project, nominating representatives. Who has overall responsibility to work with the client? Will a board/committee be established to oversee the deliver and performance of the project? How will Indigenous control be maintained?
6. **Financial arrangements** – costs incurred before the project, payment of funds.
7. **Intellectual Property** – parties should be vigilant with protecting their IP when collaborating and should carefully consider what IP is brought into the collaboration. Management of IP should be

¹¹ Law Way Workshop, Terri Janke and Company Pty Ltd.

considered at three stages, and the IP clauses in the teaming/collaboration agreement should address how IP will be dealt with in these stages:

- a. **Before entering into the agreement** – what existing IP do you own that will be brought and used into the teaming/collaboration? Parties should clearly define what this IP is and that parties retain ownership of any existing IP they contribute to the teaming and the agreement should contain licence provisions for the other part to use that IP as part of the teaming.
- b. **When the agreement is in place** – how will the parties deal with IP that is created as part of the collaboration? Who owns this IP? Will it be jointly owned by the parties?
- c. **When the agreement is terminated** – how do the parties' obligations continue in dealing with IP after the agreement ends? How can the parties use any joint IP after the agreement ends?

The Australian Government, in collaboration with IP Australia, provides a toolkit, containing guides, checklists, and model agreements, for the management and use of IP for entities who wish to undertake a collaboration project with other entities. More information about the IP Toolkit can be found here: <https://www.business.gov.au/info/run/protect-your-ideas/australian-ip-toolkit-for-collaboration>.

8. **Indigenous Cultural and Intellectual Property (ICIP)** – will there be any ICIP rights, cultural heritage rights and traditional knowledge shared in the teaming/collaboration? Parties should consider its use and management.
9. **Confidentiality** – the parties should also enter into arrangements in relation to keeping information in relation to the proposals, IP etc. as confidential and used only for the purposes of carrying out the JV.
10. **Restraint of trade** – What restrictions will be in place that will prevent employees of one entity to work for the other party (or parties) to the JV? For how long will these restrictions be in place?
11. **Disputes and Mediation** – What dispute resolution processes should be followed before going to court?
12. **Termination** – When will the agreement end? What rights do parties have to terminate the agreement? This should also anticipate what will happen to the agreement in circumstances that are beyond the control of the parties (ie an unsuccessful bid, if the customer decides to change major aspects of the project or cancel the project).
13. **Publicity** – Will parties have obligations in relation to promoting the collaboration? Will parties be consulted about any statements or announcements made in relation to the teaming?