Joint Venture Toolkit

Governance Toolkit

Australian Government
National Indigenous Australians Agency

Waalitj Hub
WA INDIGENOUS BUSINESS AND EMPLOYMENT HUB

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This document has been prepared by Jackson McDonald in collaboration with the Waalitj Hub and is funded by the National Indigenous Australians Agency.

This document is intended to provide a limited summary and overview of certain information to assist in the establishment of a joint venture or other commercial arrangement. This document has been put together having regard to the typical interests of Indigenous businesses but does not take into account any particular persons interests or circumstances and it is not intended to be comprehensive.

This document is not legal advice and must not be relied on as legal advice or as a substitute for legal advice. It is recommended that a person seeks professional legal, financial, tax and commercial advice in relation to their specific situation and circumstances. The law and other relevant circumstances may change, and no representation is made that this document is complete, accurate or up-to-date.

Joint Venture Toolkit

For more information, visit
www.wf.org.au/jv-project

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Chapter 1: Introduction

Background

An incorporated joint venture is where two or more parties agree to work together to pursue one or more business opportunities through a company that is co-owned by the parties (JV).

A JV is usually a "proprietary limited" company: a private company with only a few people owning shares (or pieces of the company).

Each party to the JV company owns a number of shares in the company that is equal to how much of the JV they own (e.g. if someone owns 50% of the company, they will own half of the number of shares that the company has issued).

Waalitj Hub have developed a number of different documents to help support Indigenous business that choose to set up a JV, including guides and checklists to help with the start-up stage and template agreements.

This Toolkit is one of those documents, and is designed to be used once the JV has been set up to help the parties make sure that the JV is properly run and follows the rules.

About this Toolkit

Once an incorporated joint venture has been set up, it's time to get down to business and start working towards delivering on the JV's objectives.

Good governance inside a JV is essential for a JV to be successful and sustainable. It also helps maintain a good working relationship between the joint venture parties.

This Toolkit sets out some useful information about corporate governance requirements. These are the requirement for how a company looks after its internal affairs.

This Toolkit focuses on the governance of company, how a board of directors works, and your responsibilities, duties and potential liabilities as a director.

It has been developed to help shareholders and directors of a JV make decisions having regard to the different legal requirements, and the decision making frameworks that are generally adopted by JVs.

Indigenous culture

A JV needs to develop a culture and a governance framework that respects the culture, values, decision making processes and ways of doing of each of the JV parties.

It is critical that a JV takes steps to engage with the Indigenous party to ensure that the culture and governance framework adopted by the JV respects and supports Indigenous governance and culture in a way that is relevant to the JV and the sector in which the JV will operate.

An Indigenous JV is, by design, operating within a unique and dynamic intercultural environment. An environment that requires a governance framework that is dynamic and incorporates the principles of effective indigenous governance:

Customised

A JV's governance framework should be customised by tailoring the governance processes, procedures and practices to align with the specific needs of the JV.

Cultural Legitimacy

The JV's governance should align with, and reinforce, the Indigenous party's ways of doing by embedding respect for culture, law and practices in the governance framework.

Two-way accountability

The JV should conduct itself in a way that is culturally appropriate for the Indigenous party at the same time as being credible to the wider business community.

Evolving

A JV's governance framework should be flexible enough to ensure that the JV is resilient and able to adapt, while maintaining its cultural legitimacy.

Chapter 2:
What is a company and how is it regulated?

Typical features of a Company

This Toolkit has been prepared to help JVs that are a proprietary limited company incorporated under the *Corporations Act 2001* (Cth) (Corporations Act).

As a proprietary limited company, a JV is regulated by the Australian Securities and Investment Commission (**ASIC**) and must update ASIC in certain circumstances.

A company is a type of business structure that is a separate legal entity. This means that the company is a separate "person":

- it is separate to the people that own or operate it;
- it has its own rights and obligations;
- it has the power to own and sell property and other assets;
- it can enter into contracts; and
- it can sue and be sued.

As a company, the JV:

- can operate anywhere in Australia
- can carry on a business - the JV incurs the costs, liabilities and losses of its activities
- is owned by the shareholders - each person or company that owns a share of the JV company owns a piece of the company
- limits the liability of its shareholders – if the company has problems, shareholders are only required to pay for the shares that they own
- has ongoing reporting and administrative requirements – the company needs to report to regulators and follow the rules
- continues to exist even if one (or all) of the shareholders change

Sources of company regulation

There are a number of rules that the JV must follow. These rules come from different places, including:

Corporations Act	The Corporations Act sets out corporate governance requirements for companies and company officers in Australia.
Company Constitution	A company's constitution sets out the rules governing the internal management of the company and the relationships between the company and its shareholders and directors
Shareholders Agreement	The Shareholders Agreement puts in place the specific decision making framework that will apply to the JV. See the *Shareholders Agreement Guide* for more information.
Other legislation, regulation and rules	The company will also need to comply withother laws, depending on its activites. Examples include, **workplace health and safety laws, employment laws, environmental laws, competition and consumer laws, mine safety laws**

Reporting Obligations – ASIC

The JV needs to tell ASIC about certain changes that it makes, including:

- **Changing the company's name**
- **Changing the company's address**
- **Changing the directors or secretary**
- **Changing the address of a director or secretary**
- **Changing the ownership of shares**
- **Changing the number of shares**

ASIC must be told about these changes within **28 days** of the change taking effect.

Chapter 3:
What is company's "governance"?

What is governance?

"Governance" is a broad concept that refers to the framework of rules, systems, processes, roles and relationships that impact on how an organisation makes decisions, operates and carries out its activities.

The governance framework that is adopted by an organisation generally reflects the size and complexity of the activities and operations of the organisation's activities.

For a JV, governance refers to the rules, systems and processes that are in place to effectively manage and oversee the activities of the JV. It outlines how the JV parties make decisions and manage the JV business.

Governance impacts on various different aspects of a company's operations. Generally, from a practical perspective, governance includes:

Frameworks for managing the JV's activities (i.e. the role of the board and directors)

Checks and balances between the board, shareholders and other stakeholders (i.e. authority and accountability)

Setting objectives, managing risk and monitoring performance

Good governance principles

Developing and embedding good governance into a company's structure and activities requires a commitment to the following principles:

Transparency
- The company's structure, purpose and activities are clear
- Shareholders and the directors are on the same page

Accountability
- Clear decision making processes
- Consequences where processes aren't followed

Responsibility
- Recognition that the company is managed and operates for the benefit of all shareholders

Performance
- Delivering the agreed outcomes
- Addressing what happens if agreed outcomes are not achieved

Integrity
- Commitment to ethical behavior and compliance with the law

Chapter 4: The Board, Shareholders and Management

Who has a role in a JV's governance?

The key players in the JV's governance include:

Shareholders

The owners of the company decide who is responsible for looking after the company

- Decides **WHY** the company exists.
- Funding the company, or deciding how the company will be funded.
- Appoint directors to the board.
- Approve particular matters (called reserved matters) if required under the shareholders agreement.
- Receives reports on plans, strategy and performance.
- Receives reports and information about the financial budget.
- Receives reports, updated and detailed information about the company's financial performance.
- Share in the Company's profits through dividends.

Board

The team of people who oversee the JV's activities and make sure that management is doing a good job

- Decides **WHAT** the company does and what it should become in the future – its goals and aspirations.
- Role is to lead and govern the company.
- Focus is on vision, strategy and long-term goals.
- Sets plans and strategy.
- Approves the financial budget.
- Oversees finances through financial reports to the board.
- Assesses management of risk through reports to the board.
- Manages the relationship with senior management.

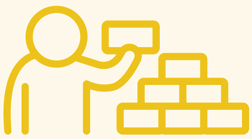
Management

Responsible for day to day operations, implementing the board's plans and reporting regularly to the board

- Decides **HOW** the company can reach the goals and aspirations set by the board.
- Role is to manage the activities of the company.
- Focus is on operations, processes and activities.
- Implements plans and strategy.
- Assists with developing the budget. Purchases within the board approved budget.
- Understands the financial detail of the operations and activities of the company.
- Develops and implements risk management plan.
- Deals with staff matters such as employment, leave applications, performance reviews, conditions and remuneration.

Shareholders

Shareholders are the owners of the company.



Each share is like a brick in a building, with each brick being the same size and having the same job. Each ordinary share is the same size, has the same rights and is worth the same amount.

Each shareholder owns some of the shares (or bricks) and these are always part of the company.

As a company is a separate legal entity, a shareholder is not responsible for the debts of the company, provided that they have paid in full for their shares.

Shareholders have certain rights and responsibilities. For a JV, these are set out in the shareholders agreement, the company's constitution and the general law (including the Corporations Act).

The role of a shareholder includes the jobs listed in the *"Who has a role in a JV's governance?"* section above, as well as the right to vote on certain decisions (called "resolutions"). This includes decisions to:

- appoint or remove a director; or
- approve changes to the Company's constitution.

Shareholders, as the owners of the company, share any profits that the company may make. A shareholders portion of the company's profits is usually distributed by a dividend that is declared by the board.

This generally involves the board deciding how much of the profit is available to be distributed to shareholders, and this amount is then divided equally between each share of the company (i.e. someone that owns 45% of the shares in the company will receive 45% of the profit that the board decides to distribute to shareholders).

Board of directors

The board is the team of people who are responsible for the general oversight of the company and its activities.

The Board may exercise all the powers of the company (unless the rules specifically say that a power must be exercised by the shareholders).

All decisions for the company are made collectively by the board and all directors share equal responsibility for those decisions – even if a director does not support a particular decision.

The board and each director are accountable to the shareholders.

Chapter 5:
The role and responsibilities of a Director

What is a Director?

Directors have broad responsibilities to a range of stakeholders and are accountable to every shareholder.

Directors are not there to act in their own interests or on behalf of just a few people.

Directors work as a team (called the "board") and each director participates as part of the team to look after the company's best interests.

Being a director does not give a person the authority to make decisions for the company (e.g. to sign a contract on its behalf). It is the Board as a whole that makes decisions, and then authorises one or more people to implement its decisions (e.g. authorising a director to sign a particular contract).

Your rights as a director

Directors have a number of different rights that are designed to help them do their job. These include the right:

- to **delegate their power / authority** – the board can involve other people in its decision making by delegating some of its powers to them (e.g. a committee of directors, a single director or an employee or contractor of the company), allowing the board to have confidence that people with the appropriate expertise and experience are able to be provide advice and help in the board's decision making;
- to **access company information records and documents** and to receive information in a timely manner – directors need to have confidence that they have all the information that they need to do their job, and it's the company's job to make sure this happens;
- to **access independent professional advice** and information;
- to **reasonably rely on information** or advice given by employees, officers, directors, committees or professionals that have been tasked with that particular job; and
- **to be heard** – to have their views and concerns heard and discussed at board meetings, and to have these views recorded in the minutes.

Your duties as a director

Directors have very important legal duties and responsibilities. These are designed to protect the company and other stakeholders by ensuring that directors act in the best interests of the company.

As directors are responsible for making decisions on behalf of the company, the law imposes strict obligations (called "**directors duties**") on directors. These duties and responsibilities are part of the general law and the Corporations Act.

There are 5 main directors duties:

1. A duty to act with care and diligence
2. A duty to act in good faith
3. A duty to disclose material personal interests
4. A duty to not improperly use their position or information they obtain because of their position
5. A duty to prevent insolvent trading

Duty to act with care and diligence

! *You must exercise your powers with the care and diligence that a reasonable person would exercise in your position (and the position of your company).*

This duty imposes a standard of care and diligence that must be applied when doing the job of a director. Directors must be interested in the activities of the company and be prepared to make decisions. This means that a director needs to:

- Take time to understand their role as a director.
- Read the board papers before meetings.
- Ask questions and participate in each meeting.
- Turn up to meetings on time.
- Listen to the other directors and work as part of a team.
- Take time to read and understand the Shareholders Agreement and the constitution – follow the rules and ask if they are unsure about something.
- Take time to understand the company's obligations (under contract and general law) and make sure its meeting those obligations.
- Know the company's financial position – take time to read and understand the financial statements and management reports.

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- Protect the company and its assets. Understand the company's potential risks, and work with the board to ensure that those risks are being sufficiently managed.
- Make sure that the company only undertakes activities that further its Strategic Plan.
- Make sure there is enough information and time to make good decisions.

This does not mean that you have to be an expert on everything. But if you are unclear or confused about an issue, you should get all of the information you need (maybe from an outside expert) to make an informed decision.

A breach of this duty gives rise to a civil penalty but not criminal liability.

(Corporations Act reference – section 180)

Duty to act in good faith and for a proper purpose

You must be honest and loyal. Your decisions and actions should always be in the best interests of the company.

This duty requires directors to act in what they genuinely believe to be the best interests of the company. The actions of directors must be aimed towards achieving a positive outcome for the company, and not some other purpose (e.g. obtaining a benefit for themselves).

This requires a director to:

- Understand the company's activities.
- Make sure that they make decisions that promote the company's activities and align with the values of the company.
- Keep their responsibilities and duties in mind when making decisions as a director.
- Make up their own mind and do what they think is best for the company (even if it sometimes means taking a different view to the other directors).
- Avoid conflicts of interest – let the board know if they have a personal interest in something being considered by the board and manage any conflicts of interest when they occur and be alert to conflicts of interest that other directors may have (see "Chapter 6: Conflicts of interest").
- Do not make decisions that favour themselves or their family over the company.
- Put the interests of the company and all shareholders ahead of their own personal interests.

A breach of this duty gives rise to a civil penalty and criminal liability (if the breach is reckless or intentionally dishonest).

(Corporations Act reference – section 181)

Duty to disclose material personal interests

You must give notice to the other directors if you have a material personal interest in a matter relating to the affairs of the company.

A material personal interest is any thing that might influence the decision that you make on a particular issue. A material personal interest is a conflict of interest – what is in the best interest of the company might not align with what's in your own best interests.

You do not need to give notice of a conflict of interest if the interest:

- arises because you are a shareholder and it is held in common with other shareholders;
- arises in relation to your pay as a director; or
- relates to a contract that must be approved by shareholders and will not impose any obligation on the company if it is not approved.

You can give a standing notice of an ongoing interest so that you do not need to give separate notice at each directors meeting.

See "Chapter 6: Conflicts of interest" for further information.

A breach of this duty gives rise to a civil penalty and criminal liability.

(Corporations Act reference – section 191)

Duty to not use position or information improperly

You must not misuse your position or information that you receive to benefit yourself or someone else or to cause harm to company.

This duty prevents a director from specifically pursuing a personal interest over the interests of the company.

This means that a director must:

- Not use their position as a director to the detriment of the company.
- Not use their position as a director for their benefit or to benefit their family or friends.
- Keep information confidential – must not pass on information about shareholder or board meetings to other people or give out information to others.
- Make sure that information that they obtain as a director is only used for the company's purposes.
- Do not use information that they obtain as a director of the company for their own or their family's purposes.

A breach of this duty gives rise to a civil penalty and criminal liability (if the breach is reckless or intentionally dishonest).

(Corporations Act reference – sections 182 and 183)

Duty to not trade while insolvent

You must not allow the company to trade when it does not have enough money to pay its bills when they are due.

Directors have a duty to prevent the organisation trading if it is insolvent. This means that before the board agrees to the company incurring a new debt, the directors must be confident that the company will be able to pay the new debt when its due.

If you breach your duty and the organisation is trading whilst insolvent then you can be personally liable for the debt that the company has incurred. You may also be disqualified from managing a company.

You should always know the financial position of the company. Ask questions of management if anything is not clear. The board should make sure that the management team provide reports in a format that works best for the board.

A breach of this duty gives rise to a civil penalty and criminal liability (if dishonest).

(Corporations Act reference – section 588G)

Directors and officers insurance

A JV can choose to put in place and maintain directors' and officers' insurance (D&O insurance), a special type of insurance policy that is designed to protect directors and officers in certain circumstances.

The JV might also choose to enter into a *deed of access, indemnity and insurance* with its directors. This is an agreement that requires the company to maintain, at its expense, D&O insurance for the benefit of a director for seven years after they cease to hold office as a director.

Chapter 6: Conflicts of interest

Conflicts of interest

Sometimes the board will be making a decision about something that benefits one particular director, a shareholder or someone close to a director (e.g. family or friends). In this situation there is an actual or perceived conflict of interest because that director cannot make an impartial decision.

As noted above, directors have a duty to disclose conflicts of interest (also called a material personal interest).

Examples of a conflict of interest include:

- Contracts with a business that is owned or run by you or your family.
- Getting your family or friends jobs or contracts with the company.
- You or your family tendering for a job or contract with the company.
- Giving special treatment to yourself, your family or friends.
- Making decisions on matters that helps your own business.

Conflicts in a JV company

Due to the ownership structure and business activities of a joint venture, conflicts of interest often arise.

These conflicts often arise where the board is making decisions about acquiring goods or services from, or entering into a contract with, a JV party or a person associated with them. For example, a JV party (or one of its related parties) may:

- hire equipment to the JV;
- provide labour to the JV;
- provide management services to the JV; or
- sell equipment or other goods to the JV.

When these situations arise, it is important that conflicted directors notify the other directors of any real or perceived conflict of interest as soon as possible. Usually, in a JV these conflicts will generally be known and understood. However, it is still important to disclose the conflict.

The Shareholders Agreement will often deal with this type of situation. It might say that the conflicted director is not entitled to vote on a certain matter involving the provision of goods or services by that directors associated shareholder.

Identifying a conflict of interest

When considering a conflict of interest, each director must ask themselves:

"Is there anything that might influence my decision making so that someone might think that I'm not acting in the best interests of the company?"

As a starting point, this generally involves considering whether the goods or services are being provided to the JV on "arms-length" terms (i.e. the same terms that would apply if the goods or services were being provided by an independent third party).

Some other questions that should be asked to help identify whether a director needs to disclose an actual or potential conflict of interest include:

- Is my opinion on this matter influenced by my obligations or affiliations to any other organisation or business?
- Do I have ethical concerns that are related to this matter?
- Do I have doubts about my ability to act impartially in relation to this matter?
- Do I stand to benefit personally in some way from this matter?
- Am I involved in this matter as an individual rather than solely through my role on the board?
- Will I receive a financial gain or benefit from this matter?
- Does this matter concern any of my board or committee appointments to other organisations?
- Does this matter concern my current employment or position as a director?
- Do I have family or other relationships with persons involved in this matter?

Managing a conflict of interest

Conflicts of interest often occur but they are not a problem if they are properly managed.

Most directors will have a conflict of interest (or several) at some time, particularly in a JV.

The best thing to do is to declare the interest (even if a director is unsure if it is conflict) and work with the board to make sure that its properly managed.

How a conflict of interest is managed depends on the JV's rules, both in the shareholders agreement and the constitution.

A shareholders agreement will usually provide that a director who has a conflict of interest in a particular matter:

- must not present at the meeting when that matter is being discussed and considered; and
- is not allowed to vote on the matter giving rise to the conflict.

Sometimes, the JV's constitution will permit a director who has disclosed a conflict of interest to vote on the matter giving rise to the conflict.

Chapter 7: How to conduct Board meetings

Board meetings

The Board of directors exercises its powers collectively by making decisions (and passing "resolutions") at Board meetings.

For directors' decisions to be valid, certain procedural requirements must be followed before, during and after a board meeting. Some of these issues are addressed below:

Arranging board meetings

Board meetings should be scheduled in advance. This is known as "calling" a Board meeting. At times, additional board meetings may need to be scheduled to attend to urgent business.

An individual director can call a board meeting by telling every other director in advance that they want to hold a meeting (called "notice"). A sufficient amount of notice needs to be given of the meeting – check the shareholders agreement or the constitution to see how much notice must be given.

Board meetings can be held in person. A JV's shareholders agreement or constitution might say that a board meeting can also be held by technology (i.e. phone or video conference).

Schedule 1 contains a template Notice of Meeting.

Deciding what to discuss at board meetings

Any director can add items to the agenda of a board meeting.

To help board meetings run smoothly, items to be added to the agenda should be provided to the chairperson before the meeting. These should be clear, include a short explanation and be given to the chairperson as soon as possible.

Preparing for board meetings

The board papers should contain information about the items of business and decisions the directors will be asked to discuss at the meeting.

The following information and documents should be included in the board papers:

- Logistics – the time and place that the meeting will be held.
- Agenda – a list of the matters that will be discussed at the meeting.
- Management reports or background information about items on the agenda.
- Minutes from the previous meeting.

The board papers should be sent out before the meeting so that directors can read the information and think about the topics in advance.

Directors must make sure that they understand the information in the board papers, by asking questions of other directors and the CEO.

Holding a board meeting

At the start of a board meeting, the chairperson should confirm that the meeting has a quorum and directors have disclosed all material personal interests (conflicts of interests).

Directors will then discuss and debate the items of business that are listed on the agenda. The chairperson will allow time to hear the opinions and views of each director on each topic, both for and against an issue being discussed. This process allows directors to share ideas and raise concerns.

Decisions are made a by resolution of directors – by each director voting for or against a resolution. A resolution is passed by a majority of votes (i.e. if the majority of directors support the decision). Usually, each director is entitled to one vote on a resolution proposed to the board, unless the shareholders agreement or constitution says otherwise. Some decisions will also need to be approved by shareholders (the shareholders agreement or constitution will need to be checked).

There is no requirement for a resolution to be formally "moved" and "seconded". This is an old practice that is still followed out of tradition, but it is not a requirement of the Corporations Act.

If a resolution is passed it becomes a decision of the board. All directors must support the decision of the board once it is made and should not undermine or criticise the decision publicly.

How many directors need to be present for a meeting?

A quorum is the number of directors that must attend a board meeting for the meeting to be valid.

Generally, most of the directors (a majority) must attend a board meeting to have a quorum and they must be present at all times during the meeting. The shareholders agreement or the constitution may say if a specific number of directors, or certain directors, must be present for there to be a quorum present.

If there aren't enough directors present, then the meeting can't go ahead (or continue if it had already started).

However, if a director can't participate in part of the meeting because of a conflict of interest, then the number of directors needed to make a quorum might change. The JV's shareholders agreement or constitution should deal with this circumstance.

Attendees at board meetings

All directors are entitled to attend board meetings. Directors should attend each board meeting unless they have a good reason for not doing so. Directors should notify the chairperson as soon as they know that they can't go to a board meeting.

A director or company secretary will take notes and keep a written record of the board decisions (these are called minutes). The company secretary cannot vote on resolutions at the meeting (unless they are also a director).

Sometimes the board may invite other people to be observers at a meeting. An observer may be other staff, consultants, lawyers, accountants or the auditor. They may answer questions and provide advice to the board or information about a particular matter or the conduct of the meeting. Observers cannot vote on resolutions at the meeting.

Making decisions outside of board meetings

The directors can pass resolutions without holding a board meeting, by agreeing to a written resolution (sometimes called a circular resolution). A written resolution requires all of the directors who are entitled to vote on the decision to confirm in writing that they are in favour of the resolution. The resolution only passes once all directors sign it. The shareholders agreement or constitution will say if the directors need to sign the resolution, or if they confirm their support by email.

Schedule 1 contains a template Circular Resolution.

Disagreements with other directors or disagreeing with Board decisions

If a director strongly disagrees with a board decision then they can:

- ask that the reasons for their disagreement with the decision be recorded in the minutes;
- ask to bring a further proposal to the board suggesting another approach; or
- ask that the board monitors the effects of the decision closely and review it by a certain date.

The shareholders agreement or constitution may also have particular rules for managing disputes or "deadlocks" that are triggered by disagreements between directors.

Board discussions are confidential. You should not tell anyone outside of the boardroom how particular directors voted on decisions or what their views were.

Minutes

The board must make sure that a record is kept of the meetings and resolutions passed by the directors. This record is called the minutes of the meeting. The minutes are signed by the chairperson of the meeting and must be signed within one month of the meeting.

After the meeting, the draft board minutes are reviewed and approved by the board. The draft minutes should accurately reflect the directors' statements and positions.

Schedule 1 contains a template Minutes of a Board Meeting.

Schedule 1: Useful Templates

These template documents can be downloaded and used by your company, please modify as appropriate to individual company requirements and procedures :

- **Template Notice of Directors Meeting**
- **Template minutes**
- **Template written resolutions**