Joint Venture Toolkit

Guidance Note: Different structures for joint enterprises

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.

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

Background

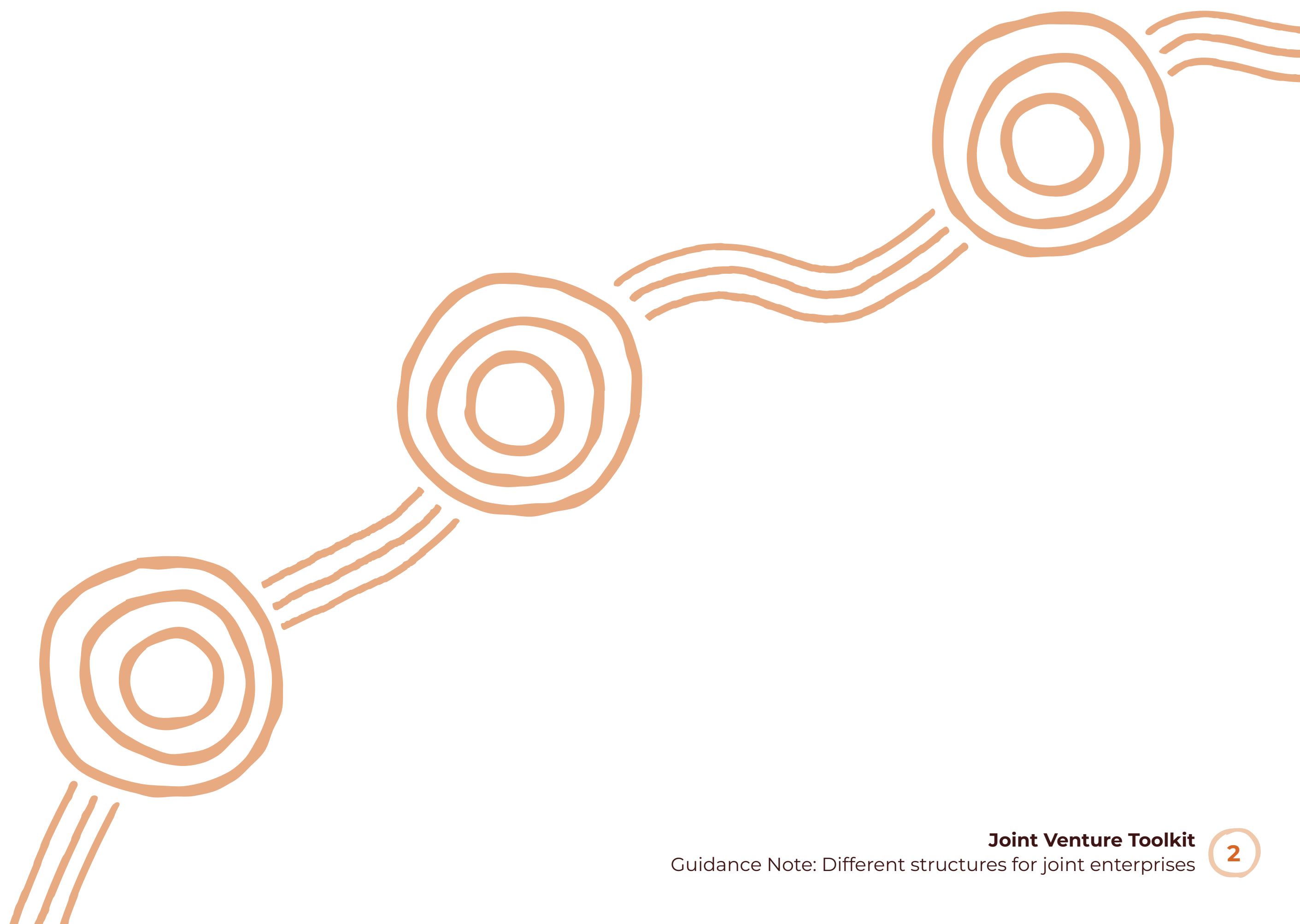
This is an important Guidance Note as it could prevent a party from entering into a joint venture when other options may be a simpler, more efficient and carry less risk.

A **joint venture** refers to a business arrangement where two or more parties come together to collaborate and work on a specific project or business opportunity.

In the Indigenous business sector, incorporated and unincorporated joint ventures are the most common structures for conducting joint enterprises. While over time, the incorporated joint venture has become a favoured legal structure through which a joint enterprise can be conducted, these structures may not always be the best choice, especially for short-term ventures or when the parties do not have an established, strong commercial relationship (i.e. the parties have not had the time to properly get to know each other in a commercial setting).

For example, rather than an incorporated or unincorporated joint venture, the parties could explore simpler, more efficient and less risky arrangements, such as alliance arrangements, subcontracting arrangements, secondments and various other arrangements.

This Guidance Note outlines the various options that Indigenous businesses should consider for the structure of a joint venture or joint enterprise.



OPTION 1: Unincorporated Joint Venture (JV)

Unincorporated joint ventures can be used in Indigenous joint ventures.

- **An unincorporated joint venture is a simple means of creating a joint venture. The JV parties jointly carry on a commercial undertaking in accordance with a contract. Unlike an incorporated joint venture, no separate joint venture entity is required.**
- **Each JV party owns a share of the joint venture assets (for example an interest in a contract or mine).**
- **There is no separate legal entity – the JV participants carry on the JV in their own name.**
- **Decisions are made by a "management committee", which includes representatives of the JV parties. Management committee members are not directors, and do not have directors' duties.**
- **The return includes the fees a JV party can charge for the goods and services it provides to the JV, the surplus funds of the JV and a "share of product" from the JV (if applicable).**
- **This option is suitable where a business has identified an experienced and established Indigenous business.**
- **An unincorporated JV is best formed for the purpose of performing a particular project or contract won by the JV parties.**
- **The parties would enter into a joint venture agreement to govern their relationship.**

Advantages

- ✓ This type of relationship is contractual and very flexible (when compared to an incorporated joint venture).
- ✓ Administratively simple and easy to establish, when compared to an incorporated joint venture.

Disadvantages

- ✗ Potential joint liability to third parties in excess of a JV party's interest in the joint venture.
- ✗ Participants do not enjoy the limited liability that arises with an incorporated joint venture.

Things to consider

In this form of joint venture, each JV party must deliver goods, services or some other benefit on behalf of the joint venture (e.g. Indigenous participation that allows the JV to access particular opportunities). If the Indigenous business is unable to contribute to the joint venture (i.e. people or services), or the JV partner excludes the Indigenous business from work relating to the joint venture, there is a risk that the Indigenous business will not receive the financial benefits from the JV. In these circumstances, the parties will need to re-assess what other benefits the Indigenous business will receive (e.g. jobs and training, or something else).

The parties to an unincorporated JV **must** ensure that there is a well-drafted contract in place to protect the individual legal and financial interests of the parties. The Joint Venture Agreement needs to clearly specify the contribution and services that each JV party will be entitled to make, and the margin it is entitled to charge.

A diagram of an unincorporated joint venture is set out in the annexure.

OPTION 2: Incorporated Joint Venture (JV)

Incorporated joint ventures are becoming more common in the Indigenous business sector.

- **This option is suitable for long term projects or where the parties are entering into large scale and high-risk projects, or where the parties want to register with Supply Nation or access opportunities under the Commonwealth Government's Indigenous Procurement Policy.**
- **The incorporated joint venture model involves the parties that will carry on the business incorporating a company specifically for that purpose.**
- **The parties in the joint venture hold shares in the JV company (i.e. the parties co-own the JV company).**
- **The JV company conducts the JV's business and owns all of the joint venture assets, not the JV shareholders directly. This means the JV shareholders enjoy limited liability.**
- **Decisions are made by a Board of Directors, who have statutory and legal duties.**
- **The financial return will include the fees that the JV company will pay to JV shareholders for the provision of goods and services to the JV Company (i.e. subcontracts) and a share of profits in the form of dividends.**

Advantages

- Widely recognised and understood corporate structure.
- The JV company carries on the business, which means any liabilities and losses sit within that company. This potentially reduces the legal risk for the individual parties.
- Regulated by well-established legal principles, which provides protection for the JV parties. This includes ready-made governance structures (i.e. the Board of Directors) for the management of the JV company's activities.
- Easy to transfer an ownership interest.
- The JV company and participants (through their nominee directors) must meet higher legal, ethical and governance standards.

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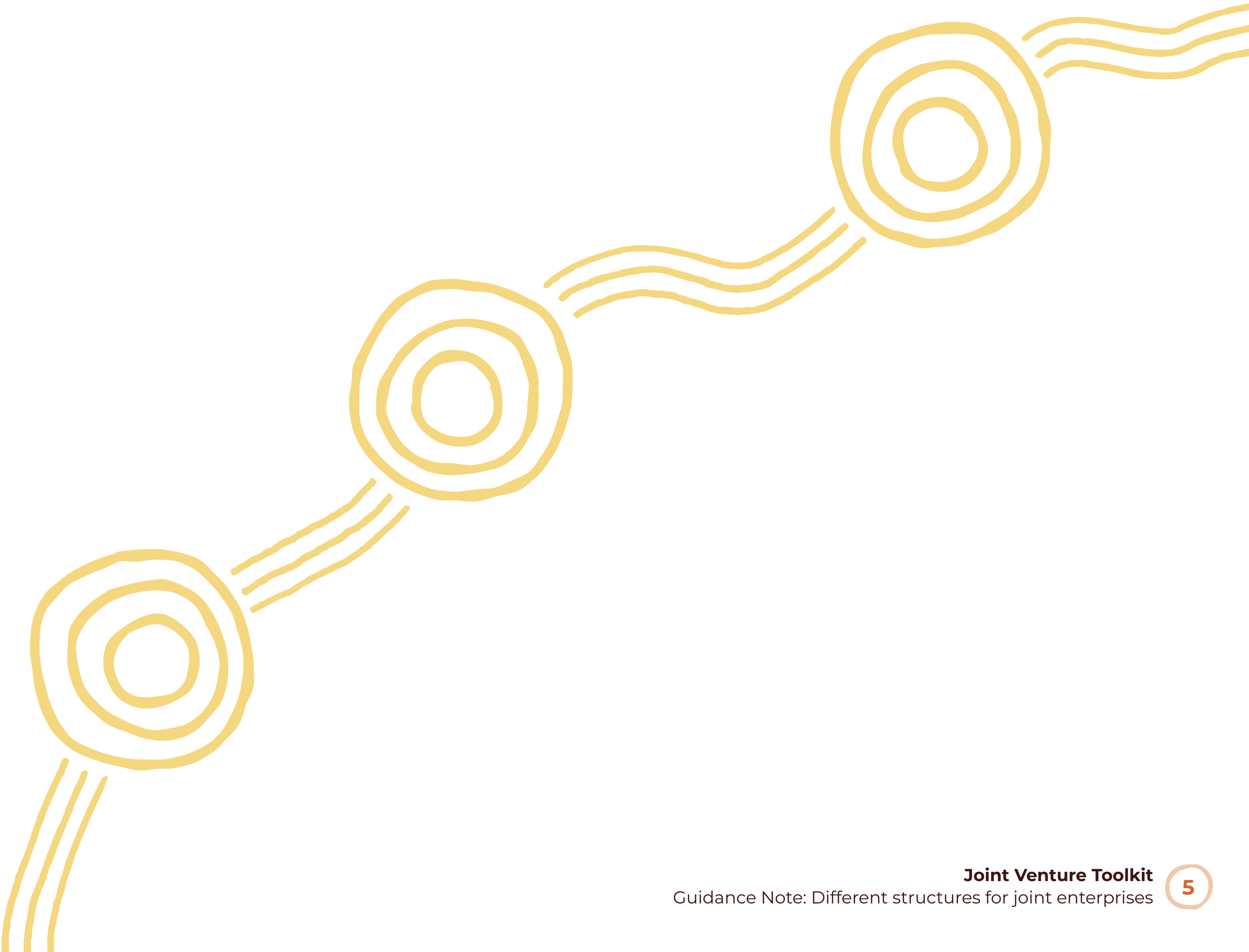
Disadvantages

- The parties to the JV can't offset any losses of the JV company against income they may receive from other projects.
- Nominee directors have to be aware of their legal duties as a director and understand how these may place them in a difficult position, particularly where there is a conflict of interest. They also need to ensure that the JV company complies with all relevant legal obligations (both arising under legislation and contracts).
- If the JV doesn't follow proper governance processes, it is possible for a party to breach the Shareholders Deed and keep the parties in the dark about the JV's operations (e.g. excluded from management decisions, not receiving profits from the JV)

Things to consider

Directors of the JV company owe duties under the *Corporations Act 2001* (Cth). These are generally designed to protect shareholders and other stakeholders. There may be significant penalties if a director breaches these duties.

A diagram of an incorporated joint venture is set out in the annexure.



OPTION 3: Subcontracting

This model involves an established business offering subcontracting opportunities to an Indigenous business. This might arise from an "alliance agreement", where the parties may agree to collaborate with each other to pursue certain types of work, on the basis that either:

- the Indigenous business will have the first right to provide subcontract work of a particular type; or
- the Indigenous business will be the "contractor" and subcontractor parcels of work to its alliance partner.

- **This option is suitable for short-term ventures or when the parties have not established a strong commercial relationship.**
- **The parties would enter into a subcontracting agreement, which sets out the scope of work, deliverables, timelines, payment terms, and other conditions.**

Advantages

- This model is administratively simple, if it involves reasonably standard subcontracts and Indigenous business has systems in place to manage the contract with the contractor in its own right. The model overcomes the extra administrative burden associated with setting up and running a JV.
- Subcontracting allows the Indigenous business to limit its financial and operational risks. It may also require a lower initial investment than a joint venture.

Things to consider

In a subcontracting arrangement, if the Indigenous business is the subcontractor, it may have limited control over the project's decision-making process and overall project direction.

If the Indigenous business is the "contractor", it will accept the burden of delivering the contract with the "principal". While it will rely on the "subcontractors" to actually deliver the project (and the contracts will "pass through" all obligations to the "subcontractor"), the relevant Indigenous business bears 100% of the performance risk. In this case, being "in the middle" of the procurement chain means that the Indigenous business will need to carefully consider the contractual basis on which it assumes or passes on risk.

The Indigenous business will need to carefully think about, and get independent advice, on how it will hold the subcontract. For example, it may be appropriate for the Indigenous business to operate as a company or a sole trader.

OPTION 4: Capacity Building Arrangement

This model involves an arrangement between an Indigenous business and a third party where the parties:

- actively identify and pursue Indigenous participation opportunities in respect of the third party's business; and
- take steps to maximise the employment, training, and business opportunities for Indigenous people in its business, through:
  - developing training and apprenticeships programs; and
  - setting employment and training targets.
- **This option is a low-risk arrangement and is suitable for Indigenous businesses who do not want to enter a legally binding contract or JV Agreement.**
- **This arrangement can be implemented inside or outside a joint venture.**

Advantages

- Unlike a joint venture or formal contract, a capacity building arrangement typically involves lower financial risks for the Indigenous business.
- This arrangement focuses on enhancing the capabilities, knowledge, and skills of the Indigenous business.

Things to consider

Unlike a joint venture or formal contract, a capacity building arrangement may not provide the Indigenous business with direct ownership or a share of any profits of the business.

The focus is primarily on capacity development rather than immediate financial gains.

The Indigenous business may also have limited control over strategic decisions and the overall direction of the capacity building initiatives.

Annexure

A simple **incorporated joint venture** is represented below:

A simple **unincorporated joint venture** is represented below: