Joint ventures in Australia: overview

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DOMESTIC COMPANY JOINT VENTURES (JVS)

Regulation

1. Are JVs expressly regulated?

There is no law expressly governing joint ventures (JVs) in Australia. JVs are subject to an amalgam of general law rules and legislation particularly in relation to corporate law, contract and agency law, commercial and trade law, taxation, competition and other regulatory aspects.

The term "joint venture" has no settled meaning in Australian law, although the term is defined in some Commonwealth statutes. In brief, a JV describes a commercial arrangement between two or more economically independent entities that can take a number of legal forms for the purpose of executing a particular business undertaking.

Types

2. Which types of JV are allowed?

Contractual

A contractual JV is also known as an unincorporated JV, which is a JV based on a contract of-co-operation (JV agreement).

A contractual JV may be more appropriate for short-term, single purpose ventures or longer ventures established for cost-sharing purposes and where the participants wish to retain flexibility as to their own tax treatment of expenditures. In an unincorporated JV, participants are bound by a contract, typically a JV agreement for mineral JVs, or a joint operating agreement for JVs in the oil and gas sector.

Corporate

JVs can be registered as limited liability companies, called incorporated JVs in Australia. An incorporated JV can hold the merged or jointly owned business interests as a part of an Australian company, incorporated under the Corporations Act 2001 (Cth) (Corporations Act).

In an incorporated JV, participants become shareholders of the JV company, typically bound by the shareholder agreement, in addition to the company constitution.

Others

A variety of hybrids of contractual and corporate JVs can be used, depending on the commercial, legal and taxation requirements of the participants. These include:

- Minority equity investment. In some cases, alliances are formed on an informal basis that is strengthened by equity investment in one party by the other or by cross-investment. This type of investment will give rise to a range of issues that need to be considered, including:
  - board representation;
- minority protection rights; and
- standstill arrangements regarding acquisitions/disposals or notification requirements (or rules concerning share acquisitions).

- Parallel JVs. Depending on taxation impact, in an international JV it may be preferable to establish a different joint vehicle for each jurisdiction (or a number of jurisdictions) as opposed to a single company.

- Dual-headed structures. A dual-headed structure can be formed where the corporate groups of the participants remain separate, but are connected by contractual relationships to operate as a single economic entity. These types of structures have been used for entire businesses located in different jurisdictions, for example, the dual-headed structures of Rio Tinto, Shell and Reed Elsevier. This allows the participants to conduct their businesses through a single merged entity but at the same time retain their existing corporate structures. These types of structures are often subject to many legal and regulatory requirements.

- Limited liability partnerships. While strictly a partnership, these have advantages in that they allow limited partners to limit their liability for losses of the venture provided they do not intrude with the day to day operations of the business. In this way they are similar to the non-operator and operator roles often found in mineral, oil and gas JVs.

3. What are the principal corporate/company laws governing corporate JVs?

Incorporated JVs are subject to all of Australia’s corporate laws including the:

- Australian Securities and Investments Commissions Act 2001 (Cth).
- Foreign Acquisitions and Takeovers Act 1975(Cth).
- Competition and Consumer Act 2010(Cth).
- Listing rules of the Australian Securities Exchange (ASX Listing Rules)

4. What are the typical JV founding documents for a corporate JV?

In an incorporated JV, participants become shareholders of the JV company. They are typically bound by the shareholder agreement, in addition to the company constitution.
Formation and registration

5. **Is the use of foreign language in a JV’s founding documents (both corporate and contractual) restricted?**

There are no express requirements in Australian corporations, contract or general law that English must be used in the founding documents of a JV. There are only language requirements under Australian company law relating to financial records. For example, under the Corporations Act, an incorporated JV’s financial records may be kept in any language. However, an English translation must be provided within a reasonable time to anyone entitled to inspect those financial records. Similarly, if one participant of an incorporated JV is listed on another exchange, ASX Listing Rules 3.1 and 15.2A dictate that an entity must give to the Australian Securities Exchange (ASX) an English translation of any material information it gives to an overseas stock exchange.

6. **Are public officers (for example, public notaries) involved in a JV’s formation procedure?**

Public officers are not involved for contractual JVs. For corporate JVs, a public officer must be appointed for Australian companies for serving tax notices.

7. **Are JVs registered with any local registries? Are public sector bodies’ authorisations required for a JV’s establishment?**

Local registries

Unincorporated JVs are not required to be registered with any local registries. Incorporated JVs must be registered with the Australian Securities and Investments Commission (ASIC) under the Corporations Act.

Public sector bodies

The approval of government bodies such as the Australian Competition and Consumer Commission (ACCC) or the Australian Treasurer, through the Foreign Investment Review Board (FIRB), may be required depending on the nature of the arrangement. There may be other transaction specific approvals required from federal state or local government bodies.

ACCC authorisation

The JV participants may seek authorisation of the ACCC if the participants consider that there is any chance of a potential breach of any of the competition prohibitions in Part IV of the Competition and Consumer Act 2010 (CCA) and the conduct is not otherwise excused by the CCA.

For authorisation, the JV participants can apply to the ACCC for immunity from the prohibitions in Part IV of the CCA. The ACCC may grant authorisation if the ACCC is satisfied that the public benefit from the conduct outweighs any public detriment, including any lessening of competition. If the parties consider it necessary to seek ACCC authorisation in relation to a proposed JV, then the ACCC’s authorisation should generally be a condition precedent to the formation of the proposed JV in the JV agreement.

In relation to any proposed business or share acquisition planned by the JV participants, the CCA provides that a corporation must not directly or indirectly acquire assets or shares where the acquisition would have the effect or likely effect of substantially lessening competition in a market. The JV can seek approval for any proposed share or asset acquisitions through either the ACCC’s informal or formal merger clearance processes or the authorisation process outlined above.

FIRB approval

For foreign participation in Australian JV projects, the participants may need to notify FIRB of certain transactions and obtain clearance before proceeding. The regime aims to ensure that foreign investment is not contrary to Australia’s national interest.

Whether a participant will need to notify FIRB will depend on whether they are a “foreign person” for the purposes of the FATA, and the value and type of the investment they propose to make. The regime applies differently for private foreign investors and foreign government investors. There are broad tracing rules that apply when determining upstream ownership (both legally and beneficially).

The fee for an application to FIRB is up to A$100,000. The exact amount also depends on the nature and value of the investment, and is indexed annually.

Regarding the JV’s business, the following acquisitions must be notified to FIRB, irrespective of the value or the nationality of the investor:

All direct investments of any nature by foreign government investors, including proposals to establish new businesses.

- All acquisitions of land by foreign government investors.
- All acquisitions of vacant land for development.
- All acquisitions of residential real estate.
- All investments of 5% or more in the media sector.

All other acquisitions (including shares or assets of an Australian business) must be notified if the target is valued at or above the applicable monetary threshold set by the Foreign Acquisitions and Takeovers Act 1975 (FATA). These include:

- For commercial real estate, where the land is deemed to be non-sensitive commercial land, the target is valued above A$252 million.
- For commercial real estate, where the land is deemed to be sensitive commercial land (including, but not limited to, land leased to Federal or State Governments), the target is valued above A$55 million.
- For a proposal including the acquisition of an interest in agricultural land where the value of the acquisition, combined with the value of interests in agricultural land already held by the investor (or its associates), exceeds or is likely to exceed A$15 million.
- For a proposal involving an interest in an Australian ‘agribusiness’, the value of the interest being acquired, combined with the value of any interests already held by the investor (or its associates), exceeds A$55 million.

Under the FATA and related regulation and policy, the monetary thresholds detailed above are different for private investors from the USA, New Zealand, Chile, China, Japan, South Korea, Singapore and Thailand. These thresholds are consistent with Australia’s commitments under various free trade agreements. However, the higher threshold is not available if the acquisition vehicle is established outside the relevant free trade agreement country (for example, if a US parent company uses a subsidiary established outside of the US, the lower threshold applies).

Generally, for US, New Zealand and Chile non-government investors, the notification threshold is A$1,094 million (indexed annually) except for investments in prescribed sensitive sectors where the standard A$252 million (indexed annually) threshold applies. The cumulative A$15 million threshold in relation to the acquisition of an interest in agricultural land does not apply to non-government investors from these nations.

Other specific notification thresholds apply to non-government investors from China, Japan, South Korea, Singapore and Thailand.

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There has been increased scrutiny of land acquisitions in Australia, with enforcement and monitoring activities transferred to the Australian Tax Office (ATO) for residential and agricultural land. The ATO has established a foreign land register (capturing all types of land, and starting initially with agricultural land). Foreign persons are required to notify the ATO of all existing agricultural land as well as agricultural land acquired. The ATO must be notified of acquisitions of agricultural land within 30 days of the acquisition.

8. **What other formal requirements must be complied with to validly constitute a JV?**

There are no formal requirements to comply with in order to constitute a JV. To constitute a JV it is important that the language of the JV agreement and its substance is such that the nature of the relationship is clear. This is to avoid any suggestion that the parties' relationship has characteristics that the Australian courts have recognised as being inherent in the partnership relationship.

To this end, a JV agreement typically includes provisions that emphasise:

- That each participant has a separate interest in the project.
- That, in the case of an unincorporated JV, the assets of the venture are owned by each participant as tenants in common.
- That no participant has authority to contract on behalf of the others.
- That each participant is able to pursue outside projects alone or with other parties, without being accountable to the other participants for opportunities arising or benefits derived.
- That the arms'-length nature of the participants' relationship, de-emphasises any relationship of trust and confidence and denies any intention to create a partnership.

The purpose of these provisions is to negate, as far as possible, the creation of any fiduciary relationship that may be held to arise between the participants or, if that is not possible, to limit the scope of any such fiduciary relationship. In certain circumstances, the law has been prepared to find that joint venturers owe fiduciary duties to each other and that these duties may exist before final agreements are concluded.

It is always a question of fact whether the relationship between participants is a partnership or a JV.

**Permitted markets**

9. **Can the JV structure be used in every industry sector? Are there any restrictions to be considered and carefully assessed before investing in a JV?**

Tax planning must be undertaken before investing. If the participants wish to preserve flexibility regarding tax treatment of their share of expenditures, then they should choose an unincorporated JV and ensure that the JV is not structured so as to receive revenue as a tax paying entity.

**Purpose**

10. **Can a JV be established with any purpose?**

A contractual or a corporate JV can be established with any purpose. As a purely contractual arrangement, the JV can be limited to its stated purpose, most usually the expenditure of budgeted funds, rather than the receipt of revenue. Similarly, the shareholders' agreement and/or company constitution can limit the corporate JV to a particular purpose.

In practice, a corporate JV's constitution will only contain the bare mechanics for the operation of the JV company, as the more detailed provisions typically will be set out in the shareholders' agreement. If there is inconsistency, the shareholders' agreement should state that it prevails to the extent of any inconsistency.

**Share capital and participation**

11. **What possible forms of participation are there in a JV's share capital? How can a JV member contribute and are there statutory limits on the possibility to make contributions in kind?**

**Forms of participation**

There are no restrictions on the forms of participation or the possible ways to contribute to a JV under Australian law. The most common ways to contribute to a corporate JV are through shareholder loans and/or in kind contributions (transfer of assets such as land) for equity. In a contractual JV, participants may similarly provide loans, or more typically make cash or in kind contributions. For an unincorporated JV, contributions are made by cash to meet budgeted expenditures.

**Contributions**

Funding requirements can be met from:

- **Loan finance.** Depending on the funding requirements of the venture, the parties may decide that the initial finance for the JV company should be injected substantially as loan capital either directly as shareholder loans from the joint venturers or from lending banks. Thin capitalisation rules may restrict the extent to which debt funding can be used. There are two main reasons why a participant will seek to inject funds by way of a shareholder loan:
  - the loan will rank ahead of any equity contributions in the joint vehicle whether on a winding up or, depending on the terms of the lending, on the occurrence of an exit event, for example, the sale of the entire issued share capital of the company; and
  - the taxation benefits to the JV and the participant.
- If any senior or mezzanine lender is required to finance the venture, they are likely to require the participants, from a risk perspective, to subscribe for a certain amount of equity capital. The shareholder loans will be subject to the priority and subordination requirements of any senior or mezzanine lender.
- **Cash or in kind contributions.** Under Australian law, consideration for the initial issue of shares by the JV company may be cash but can also be in kind, for example, the transfer of assets (such as land) to the company by the joint venturers or an agreement to provide technology or other assistance. There are special disclosure requirements for the issue of shares for non-cash consideration (see section 254X, Corporations Act).
- **Future funding.** The parties must also consider the manner in which any future finance is to be provided. Participants should agree in advance, as far as practicable, whether or not they are willing to be committed to provide further finance and, if so:
  - the time periods and monetary limits for any further finance; and
  - the conditions under which they may be required to provide further finance.
- These time periods and conditions are usually set out in the shareholders' agreement.
12. Can a corporate JV's share capital be denominated in a foreign currency?

While there is no express statutory requirement that prevents the share capital of a company being indicated by making reference to a foreign currency, practically there are some difficulties in doing so. The Australian Securities and Investments Commission's (ASIC) internal databases are unable to display specific currencies and therefore, the default currency for all share capital detailed on ASIC records is the Australian dollar. This may lead to potential disclosure issues where the company's internal records (as well as any required forms lodged with ASIC) display a share capital that makes reference to a foreign currency as it may lead to discrepancies with those public records available from ASIC, which may mean inaccurate or misleading information being available to the public. Ultimately, this would be a commercial risk for the parties to consider in their particular circumstances; however, the authors suggest that, where possible, the currency of the share capital of any JV is maintained in Australian dollars.

Duration and limits on membership

13. Are there statutory limits on a JV's duration?

An unincorporated JV involving agency and trust concepts must not extend beyond the perpetuity period, generally 80 years. For an incorporated JV, there is no limit.

14. Are there statutory limits on the number of members participating in a JV?

Depending on the Australian company structure chosen, there may be a limit on the number of shareholders. For example, a proprietary company must have no more than 50 non-employee members (that is, shareholders).

Public sector bodies

15. Can a public sector body enter into a JV agreement? Subject to what conditions? In particular, do public private partnerships (PPP) laws and regulations apply?

It is possible for a public sector body to enter into a JV and it happens often in Australia as statutory authorities are entering into contracts with the private sector, particularly in relation to developments of land, infrastructure and public private partnerships.

There are no set conditions that cover all statutory authorities. The statutory authorities enabling legislation should be reviewed to determine whether the authority has any restrictions or fetters on its ability to enter into a JV or to give effect to the JV agreement. In some cases, statutory authorities may be prohibited from being entered into JVs as to do so would be inconsistent with their role, purpose or statutory function. Even where the statutory authorities are empowered to enter JVs, it is often subject to approval by the relevant government minister.

Non-competition and antitrust clauses

16. Are there statutory constraints on the use of non-competition or antitrust clauses in a JV agreement?

During period of effectiveness

There are issues regarding the enforceability and legality of certain types of anti-competitive provisions for example, joint marketing and primary and secondary boycotting provisions/requirements. Clauses that provide for joint decisions on price, acquisition or output are strictly illegal unless permitted under the Competition and Consumer Act 2010 (CCA) or authorised by the Australian Competition and Consumer Commission (ACCC). The CCA provides for defences for JV conduct but the JV clause must comply with the requirements of the defence. The JV participants may seek authorisation from ACCC if they believe there is any chance of a potential breach of any of the competition prohibitions in Part IV of the CCA and the conduct is not otherwise authorised by the ACCC.

Following termination

Following the expiration of the JV relationship, it is sometimes unclear if it is permissible to use the intellectual property generated by and at the expense of the JV.

De facto company/partnership

17. Must the contractual JV satisfy any conditions to avoid falling within the definition of de facto company/partnership?

When an unincorporated JV has been employed, it is important for the parties involved and the investors that the agreement excludes any implication that it is a partnership. To achieve this, the JV agreement should:

- Provide for separate ownership and disposal of assets or product of the JV activity.
- Provide that JV assets are to be owned by the venturers in specified shares, as tenants in common.
- Disavow mutual agency between the joint venturers.
- Incorporate a provision confirming that a partnership is not intended. The fact that the parties to an agreement did not intend to create a partnership should be taken into account.

Limiting member liability

18. Can a JV agreement provide that a JV member can participate without incurring any risk, loss or reward?

It is possible for a JV agreement to provide that a JV member can participate without incurring any risk, loss or reward. However, in commercial matters in which JVs are commonly used in Australia, unless the parties have expressly stipulated otherwise, it is an agreement to share losses as well as profits. Common law authorities on which this is based such as Muschinski v Dodds (1985) 160 CLR 583 and other authorities have held that such a term is implied.
Anti-trust

19. Do any anti-trust rules, guidelines or policies apply to a JV agreement?

In Australia, from a competition or anti-trust viewpoint, JV agreements are subject to the Competition and Consumer Act 2010 (CCA).

The CCA prohibits various anti-competitive conduct including agreements that have the purpose or effect of substantially lessening competition. It also prohibits cartel conduct, which is strictly illegal and subject to civil and criminal sanctions.

One particular risk raised by joint activities of market participants is that it may be cartel conduct (even if they are part of a JV). Broadly, competitors must not make, or give effect to, a contract, arrangement or understanding that contains a provision that has:

- The purpose or effect of fixing prices.
- The purpose of restricting outputs in the production and supply chain.
- The purpose of allocating customers, suppliers or territories (market sharing).
- The purpose of bid-rigging.

Depending on the terms of the JV, agreement exceptions to the application of the CCA may apply. The parties may also seek authorisation of the JV from the Australian Competition and Consumer Commission.

Governance and limits on directors

20. Can the parties to a JV freely regulate the JV or are they subject to certain restrictions?

Many industries are regulated (often through a licensing procedure) regarding the admission or conduct of participants engaged in those industries, such as banking, insurance, financial services, utilities, broadcasting and telecoms. JV participants should investigate whether they operate in an industry, that has rules and regulations in place requiring them to obtain approval prior to entering into the JV.

Additional regulatory approvals or restrictions may also apply. For example, a publically-listed company may require shareholder approval under the ASX Listing Rules.

The JV parties may also require the prior consent of banks or trustees under the terms of any loan agreements, debenture stocks or trust deeds that have been entered into by the participants.

From a commercial perspective, the parties to the JV may also seek comfort from relevant approvals from existing customers or suppliers, or other counterparties to material contracts.

21. Are there limits or restrictions on the eligibility of an individual as a member of the board of directors/statutory auditor?

There are some limited restrictions to the eligibility of an individual as a director or statutory auditor. There are no restrictions on nationality. However, at least one director must be ordinarily a resident in Australia. Other restrictions exist for directors who have been bankrupt or convicted of a criminal offence. In an incorporated JV, the management function is conducted by the board of directors of the JV company.

In an unincorporated JV, the management function is conducted by a management committee comprising representatives of the participants.

The constitution should specify the composition of the board in corporate JVs, the methods of appointing and retiring board members, if there will be a managing director (chief executive officer) and/or a chairman, voting procedures, decisions (if any) that require unanimity or a special majority, the deadlock-breaking mechanisms and the particular functions to be carried out by the board.

The board has a supervisory role, therefore:

- Where two parties are contributing equally to the JV and take equal proportions of the equity, they may expect to be able to nominate equal numbers of directors thereby creating equality at board level (but with in-built potential for deadlock).
- Where one party is making a significantly greater contribution than the other parties, that party may seek the final say on matters to be decided at board meetings either through the right:
  - to appoint a chairman with a casting vote;
  - to appoint a majority of directors; or
  - for its nominee directors to have weighted voting rights.

Directors appointed by each party should, broadly, have comparable status within the respective parent organisations.

For decision-making, much will depend on the scale of the venture, the seniority of the directors and the management reporting lines envisaged by the shareholders. Particularly in the case of larger JVs, there will be certain matters that the JV parties regard as central to protecting the value of their investment. It is not uncommon to see these matters withdrawn from the authority of the board of the JV company and made subject to shareholder approval either through the shareholders’ agreement or through the JV company’s constitution (requiring unanimity or special majority approval of shareholders). In this way, the joint venturers have the opportunity to review such matters at their corporate level.

It is important to ensure that there are no conflicts in relation to directors’ voting powers and their appointment between the shareholders’ agreement, the company’s constitution, and the relevant company laws. While a shareholders’ agreement can, as between the parties to it, override the requirements of articles of association or a constitution, it is often not possible to contract out of a statutory requirement, for example to the effect that written resolutions must be signed by all directors.

Incorporated JV – duties owed by a director

The duties owed by a director of a JV company are essentially the same as the duties owed by a director of any other company.

However, the application of these duties may be more complex in the context of a JV company where a director will frequently have concurrent loyalties to the JV company and the appointing shareholder.

Although a participant’s nominee director(s) is appointed to the board of the JV company to represent the interests of the participant, the legal requirement is that nominee directors must act in the interests of the company as a whole, not in the interests of their nominator. No definitive principles have been enunciated to deal with these potential conflicts.

In practice, the shareholders’ agreement (or constitution) may contain provisions relating to the disclosure of information by nominee directors to their appointing shareholder (and sometimes the extent of their duties owed to the JV company). Also, nominee directors usually make disclosures under sections 191 and 192 of the Corporations Act to deal with potential conflicts of interest.
under the Corporations Act (although the general law position will also need to be considered (section 193, Corporations Act)). These issues need to be considered and advice taken on a case by case basis.

In addition to the usual duties owed by the director of any company, further duties and constraints may be imposed on directors of a JV company, either through the company’s constitution, a separate shareholders’ agreement or a combination of the two.

**Incorporated JV – shadow directorship**

In light of the duties and liabilities owed by nominee directors of JV companies, it has become increasingly common for some participants not to appoint a nominee to the board or not immediately to appoint their nominee to the board. Instead a participant may seek to incorporate into the shareholders’ agreement:

- Observer rights (for example, the right to attend and to speak but not to vote).
- Advice conditions (the requirement to obtain the advice of a participant on board resolutions before considering and resolving on same).
- Veto rights on board decisions at a shareholder level, for their benefit.

Such practices may be adopted effectively to control the decision-making of the board of an incorporated JV when there is a reluctance on the part of a participant to appoint a nominee to the board.

However, if through the implementation of these practices, a participant is deemed directly or indirectly to exercise the powers, and discharge the functions, of the board, then notwithstanding a participant’s intention in adopting such practices, the participant may unwittingly find itself liable to discharge certain duties and liabilities as a shadow director of the JV company.

Participants in an incorporated JV should be made aware of, and consider, the risk, through the implementation of such practices, of being deemed a shadow director of a JV company under the governing law of the JV.

**Termination**

**22. What legal regime applies to a JV’s termination? Can a JV be terminated for just cause or on request of one party?**

Essentially, corporate and contractual JVs differ in terms of the way that they can terminate. Ultimately both will be terminated when there is only one party remaining or where the parties mutually withdraw for any number of reasons such as abandonment of the venture or insolvency. However, the termination of corporate JVs is regulated through statutory administrators and regulations, and contractual JVs’ withdrawals are guided by principles of contract law.

**Termination of a corporate JV**

The circumstances and manner in which a JV can be terminated in the event of a default will be covered by detailed provisions in the JV/shareholders’ agreement. The termination of a JV does not necessarily involve the winding-up of the JV company or the cessation of its business. There may simply be a change of shareholder.

**Oppression of the minority**

A JV holding a minority stake in an incorporated JV may be able to pursue statutory relief where it believes that its interests are being oppressed or ignored by the majority shareholders. Sometimes, depending on the circumstances, this can lead to the court ordering the winding-up of the incorporated JV.

**Dilution**

JV agreements sometimes deal with the prospect of default by a joint venturer through dilution of the defaulting joint venturer’s interest in the project to the other joint venturers. Such a provision usually sets out a formula for abatement of the share of the defaulting joint venturer, and is generally used where the relevant breach may not necessarily be fundamental to the continuation of the enterprise and does not warrant termination of the joint venturer’s interest. For example, in the case of a venture that requires significant capital expenditure in the future, such that the parties’ commitments to provide future funding are key to the success of the venture, an appropriate default provision where a party fails to provide its share of the funding could be the dilution of the defaulting party’s shareholding.

**Effect of termination**

The exit provisions in a shareholders’ agreement need to address the consequences for the leaver and for the remaining participants. An exiting party that has discharged its responsibilities would normally be treated more favourably than an exiting party that is in default. For example, the shares or JV interest of a non-defaulting leaver may be transferred to the other participants at fair market value, while those of a defaulting leaver may be transferred at a discount.

Factors to be considered in relation to the termination of the agreement include:

- Whether a non-compete undertaking should continue, at least for a period, after termination.
- The duration of confidentiality obligations after termination.
- Whether loans from the leaving party are to be repaid by the JV company on their exit, or required to be assumed by the continuing or incoming parties.
- The treatment of employees.
- Whether the continuing or incoming parties should assume the outgoing party’s obligations under any guarantees or counter-indemnities given for the benefit of the JV company.

**Termination of a contractual JV**

The JV agreement should contain provisions identifying the circumstances in which a participant is in default of its obligations, the consequences of default and the rights of the non-defaulting party(ies). Events that will terminate the JV commonly include:

- A material breach by the other party of the terms of the JV agreement, or of a material ancillary agreement, which the non-defaulting party elects to treat as a terminating event (usually following a period during which the breach can be remedied, if capable of remedy).
- The insolvency of either party, although it may be more appropriate in such circumstances to grant the other party a call option to allow that party the opportunity to buy the insolvent party’s shares in the JV.

Some JV agreements specify the events of default on which one or other of the parties must leave the JV. This may be for reasons that do not involve a breach of the agreement, for example where a participant undergoes a change of ownership or control that makes it inappropriate for that participant to remain in the JV with the others.

It is important to ensure that any consequences of default provided for in the JV agreement do not operate as a penalty. In some cases, a provision in a JV agreement requiring a defaulting participant to transfer some or all of its shares or interest to some or all of the other participants has been held to be invalid as a penalty. A provision of this kind is a form of “agreed damages clause”. An agreed damages clause will be invalid as a penalty, if the amount of damages stipulated is extravagant and unconscionable in
comparision with the greatest loss that may conceivably be proved to have followed from the breach. The refusal of the courts to enforce such penalty clauses is based either on infringement of a rule of the common law or the exercise of an equitable jurisdiction to control penalties. These tests must be borne in mind when drafting default clauses in JV agreements.

For example, in the context of JVs, a clause requiring a defaulting joint venturer to transfer its shares to other venturers has been held not to be a penalty in the following circumstances:

- The high risk and high cost commercial nature of oil exploration required forfeiture provisions to ensure an undisrupted flow of funds (Monarch Petroleum NL v Cito Australia Petroleum Ltd [1986] WAR 310 at 319 per Kennedy J).
- The clause required the defaulting party to sell its interest to the non-defaulting party at market value (less 5% after having been given 60 days' notice in which to remedy the default (CRA Ltd v NZ Goldfields Investments [1989] VR 875).

**Withdrawal following a specified event or unilaterally**

A JV agreement may contain a right of withdrawal, which may be triggered on the occurrence of certain prescribed events, for example the expiry of a definite term or the completion of a particular project for which the venture was formed.

Depending on the trigger mechanism and the commercial position of the parties at the time of withdrawal, it will be necessary to determine whether the JV can continue without the participation of that member or if the venture should be wound up.

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23. **Is the termination of a JV agreement subject to any public sector body's approval?**

The termination of a JV agreement is not subject to any public sector body's approval unless it involves a public body directly. If the parties wish to exit, they must reach an agreement at that time as to how the JV will be terminated.

**Choice of law and jurisdiction**

24. **Are there constraints on the choice of the law and the jurisdiction applicable to a JV?**

It will be necessary to determine at the planning stage of the JV the appropriate governing law of the JV. The first item to check (usually after the tax advisers choose the appropriate jurisdiction) is whether it is necessary to apply the substantive law of the local jurisdiction (in accordance with the laws of that jurisdiction).

If the parties choose a governing law, it is likely to be enforceable by the courts of that jurisdiction, if the choice is bona fide and there are no public policy reasons for overriding the choice.

For dispute resolution, generally, the parties should nominate a jurisdiction where enforceability of the agreement will not be an issue.

**JVS WITH FOREIGN MEMBERS**

**Validity and authorisation**

25. **What are the rules relating to validity and authorisation of JVs with foreign parties?**

**Validity**

JVs with foreign investors are valid in Australia and are common, particularly in the energy and resources industry.

**Limits**

There are no statutory restrictions on the maximum or minimum number of parties who need to be a local.

**Authorisation**

The law that governs foreign investment is the Foreign Acquisitions and Takeovers Act 1975 (FATA). The administering authority in this area is the FIRB, which examines proposals by foreign interests to undertake direct investment in Australia and makes recommendations to the government on whether those proposals are suitable for approval under the government's policy.

FIRB's functions are advisory only. Responsibility for the government's foreign investment policy and for making decisions on proposals rests with the Australian Treasurer.

The main functions of the FIRB are to:

- Examine proposed investments in Australia that are subject to the FATA and supporting legislation, and to make recommendations to the Treasurer and other Treasury portfolio ministers on these proposals.
- Advise the Treasurer on the operation of the FATA.
- Foster an awareness and understanding, both in Australia and abroad, of the FATA.
- Provide guidance to foreign persons and their representatives or agents on the FATA.
- Monitor and ensure compliance with the FATA.

The government wishes to make sure that foreign investments, including JVs, are not contrary to the national interest. If an investment is contrary to the national interest, the government will intervene; however, this rarely occurs. The Australian Government generally encourages foreign investment as it helps the economy and enhances growth.

**Effect of foreign membership**

26. **Are any of the rules relating to domestic company JVs (see Questions Question 1 to 23) different for JVs with members incorporated under, or governed by, the laws of a foreign country?**

Broadly speaking, the rules relating to domestic company JVs are similar to those for JVs with members incorporated under, or governed by, the laws of a foreign country. However, unlike domestic company JVs, foreign participation in Australian JV projects may require Foreign Investment Review Board (FIRB) approval (see Question 6, FIRB approval).

**Economic or financial incentives**

27. **Are there economic or financial incentives for foreign direct investments in a JV?**

The economic incentives for foreign direct investments in a JV are, generally, the same as for local investors. The ability to spread the cost and risk are the main incentive for a foreign investor. A significant number of mining exploration and production projects are operated through JVs. A JV structure is well-suited to energy and resources projects for a range of commercial, logistical and financial/accounting taxation reasons. The financial cost of operating mining activities in Australia is high because of the remote locations that make access and transportation to and from the project difficult. The use of JV structures are increasingly popular for resource projects because of their ability to spread the costs and risks involved.
Another reason why unincorporated JVs are popular is that the structure allows the JV to access any taxation concessions in the manner that most suits the overall taxation policy of the company/corporate group. For example, a JV may wish to claim immediate tax write-offs, where another JV may wish to amortise its investment over a longer period.

### Minimum investments/contributions

28. Are there mandatory minimum equity investments or contributions in kind thresholds for a foreign JV member?

There are no mandatory minimum equity investments or contributions in kind thresholds for a foreign JV member.

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### THE REGULATORY AUTHORITIES

#### Australian Securities and Investment Commission (ASIC)

**Main activities.** ASIC is Australia's corporate, markets and financial services regulator. ASIC is an independent Commonwealth Government body and was set up under and administer the Australian Securities and Investments Commission Act 2001 (ASIC Act). ASIC carries out most of its work under the Corporations Act 2001 (Corporations Act).

Under the ASIC Act, ASIC is required to:
- Maintain, facilitate and improve the performance of the financial system and entities in it.
- Promote confident and informed participation by investors and consumers in the financial system.
- Administer the law effectively and with minimal procedural requirements.
- Enforce and give effect to the law.
- Receive, process and store, efficiently and quickly, information that they receive.
- Make information about companies and other bodies available to the public as soon as practicable.

**Website:** [www.asic.gov.au](http://www.asic.gov.au)

#### Foreign Investment Review Board (FIRB)

**Main activities.** FIRB is a non-statutory body established in 1976 to advise the Treasurer and the Government on the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) and its administration.

FIRB functions are advisory only. Responsibility for making decisions on the FIRB Policy and proposals rests with the Treasurer. The Treasury's Foreign Investment and Trade Policy Division provides secretariat services to FIRB and is responsible for the day to day administration of the arrangements.

The role of FIRB, including through its secretariat, is to:
- Examine proposed investments in Australia that are subject to the FATA and supporting legislation, and to make recommendations to the Treasurer and other Treasury portfolio ministers on these proposals.
- Advise the Treasurer on the operation of the FATA.
- Foster an awareness and understanding, both in Australia and abroad, of the FATA.
- Provide guidance to foreign persons and their representatives or agents on the FATA.
- Monitor and ensure compliance with the FIRB Policy and the FATA.

**Website:** [www.firb.gov.au](http://www.firb.gov.au)

#### Australian Competition and Consumer Commission (ACCC)

**Main activities.** The ACCC promotes competition and fair trade in markets to benefit consumers, businesses and the community. It also regulates national infrastructure services. The ACCC's primary responsibility is to ensure that individuals and businesses comply with Australian competition, fair trading and consumer protection laws, in particular the Competition and Consumer Act 2010.

**Website:** [www.accc.gov.au](http://www.accc.gov.au)

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### ONLINE RESOURCES

#### AustLII

**Website:** [www.austlii.edu.au](http://www.austlii.edu.au)

**Description.** AustLII is an online free-access resource for Australian legal information. AustLII is a joint facility of the University of Technology, Sydney and the University of New South Wales Faculties of Law. AustLII maintains its own collections of primary materials: legislation and court judgments. AustLII also has a collection of secondary materials: commentaries and summaries on the law.
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Recent transactions  
- Advising the State Government of Western Australia on the proposed long term lease of the Port of Fremantle and Utah Point (Port of Port Hedland)  
- Advised China Hanking on the sale of its Southern Cross gold assets.  
- Advised Legend Holdings on its strategic acquisition of a controlling interest in the Kailis Bros seafood wholesale business.  
- Advising the State of Western Australia, in partnership with the State Solicitor’s Office, on all aspects of the negotiations between the State and China’s Shanghai Zhongfu Group.  
- Advised Baosteel Group Corporation on a joint A$1.4 billion off-market bid to acquire 100 per cent of the share capital of Aquila Resources.  
Languages. English, Japanese  
Professional associations/memberships  
- Australia China Business Council (WA), President.  
- Australia China Business Council, National Board.  
- Australia China Business Council, Pilbara Regional Committee, Chairman,  
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