

Joint Venture Agreements - Guidelines

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1.0 Introduction

The *Government Owned Corporations Guidelines for Joint Venture Agreements* (Guidelines) set out the key issues for Government Owned Corporations (GOCs) to consider when contemplating entering into Joint Venture (JV) agreements to ensure arrangements are structured to most effectively pursue GOCs' commercial objectives without impinging on the State's ability to manage its asset risk over time.

The Guidelines apply to all GOCs as appropriate, and are intended to provide a nonexhaustive guide to good practice contracting. QIC Limited is exempt from the guidelines' application. The parent company board is accountable to ensure the guidelines are followed by all the GOC's controlled entities, with the guidelines to be applied through a statement of compliance in the parent GOC's Statement of Corporate Intent for the relevant financial year.

The Guidelines are to be applied in conjunction with the *Investment Guidelines for Government Owned Corporations* (Investment Guidelines). The Investment Guidelines require JV arrangements to be entered into only when considered to be the most appropriate vehicle of achieving a GOC's financial and strategic objectives. GOCs are encouraged to identify a corporate structure that will protect their investment when undertaking a project with third parties and should ensure risk sharing arrangements are commensurate with their own contribution to a joint venture relationship established with third parties. Arrangements should be structured to best balance commercial arrangements, returns, risk, flexibility and protection, in consultation with shareholding Ministers.

GOCs should confirm to shareholding Ministers that they are not carrying a disproportionate share of risk associated with an investment involving a third party and that tax payments will accrue to the State Government.

2.0 General considerations

- Joint Venture Agreements (JVAs) should reflect the attributes and contributions that each party brings to the JV.
- JVAs should have regard to the fact that a Government Owned Corporation joint venturer (GOCJV) is different to a private sector joint venturer, by reason of its government ownership and the different statutory obligations that it has (under the *Government Owned Corporations Act 1993* (Qld) and otherwise).
- Issues such as default, assignment, exit and dispute resolution should be considered upfront to provide greater assurance that the joint venturers are at one in their expectations as to the operation of the JV.
- The deferral of such matters for consideration at a later time, or reliance on the continued goodwill of the parties to resolve such issues if they arise, should be avoided.
- The selection of the other joint venturer (OJV) should take into account the following factors:
 - the contribution that the OJV will bring (either financial, technical, assets or otherwise);
 - its track record in previous JV arrangements in the same sector, including with other Government Entities (whether in Queensland or elsewhere);
 - whether the subject of the proposed JV is core business for the Other Parent and the length of its involvement in that sector;
 - whether the Other Parent is susceptible to takeover or privatisation;
 - the transparency of the Other Parent group (whether they are subjected to the continuous disclosure obligations of listed companies or the like);
 - reputational issues (as to the Other Parent entities, their directors and management and major shareholders) and financial strength; and
 - the OJV's propensity to successfully resolve disputes through litigation or alternative means.
- No announcement should be made by any party (either to a potential OJV or publicly) of the approval or implementation of a particular arrangement unless it has all necessary internal approvals and shareholding Ministers' approval. The preferred approach is that after the proposal has undergone significant preliminary review and consideration by the sponsoring GOC, consultation be undertaken with Queensland Treasury, which will facilitate consultation with the shareholding Ministers.

- When negotiating and documenting JVAs, GOCs should be mindful of the provisions of the *Competition and Consumer Act 2010* (Cth) prohibiting and criminalising cartel conduct. Legal advice should be sought to ensure that any proposed JVA will not breach competition laws.
- When contemplating entry into a “rolling JV” (arrangements where a more fulsome JV results from a preliminary stage, such as a bidding consortium for a project), particular care needs to be taken to be clear as to:
 - whether the participants are obliged to participate in a further JV arrangement (eg for production, development or commercialisation);
 - the terms and conditions upon which participation in that further JV are to be conducted;
 - the rights and liabilities as to bid costs between the participants in the further JV as against those who elect not to, or are precluded from, participation in the further JV; and
 - the rights and obligations of the further JV as to intellectual property and know-how used in or developed during a bidding process, as held by both those who participate in the further JV and those who do not.
- Queensland Treasury should be consulted prior to entry into a rolling JV, even if the initial investment is below the GOC investment approval and notification thresholds specified in the Investment Guidelines.
- JV documentation or memorandums of understanding should not be signed without prior consultation with shareholding representatives.

3.0 Agreements

(a) Mandatory provisions

- The following provisions should be treated as mandatory for inclusion in all JVAs:

Guarantees

- The JVA should contain an explicit statement that the GOC JV’s obligations and performance are not guaranteed by the State of Queensland or the parent GOC (where the GOC JV is a GOC subsidiary).
- The JVA is to contain an explicit statement that the returns under the JVA, and Related Agreements, are not warranted or guaranteed by the GOC JV.
- Parent GOCs should not provide guarantees to GOCJV or assume any liabilities of the GOC JV unless specifically approved by shareholding Ministers, consistent with the Investment Guidelines.

Confidentiality

- JVAs must permit the unqualified right to disclose confidential information by the GOCJV:
 - to the GOC JVs’ shareholding Ministers and their respective advisers, shareholding departments, Queensland Treasury and the Auditor-General;
 - to the parent GOC, other members of the GOC group and their respective advisers;
 - in order to comply with the requirements of any law (and not just the laws of a particular jurisdiction, including the right to information legislation); and
 - in order to comply with the GOC JV’s normal statutory and commercial obligations e.g. in liaising with and responding to enquiries of regulators, including where applicable Australian Securities and Investment Commission, Australian Prudential Regulation Authority, Australian Competition and Consumer Commission, Australian Energy Market
- Operator and State-based regulators.
- JVAs must include a right of access to the books and accounts of the GOC JV by the GOC and its auditors.
- JVAs must also permit the right to disclose by a GOC JV:
 - in order to comply with the GOC JV’s normal contractual obligations e.g. in liaising with and responding to, contractors, financiers, insurers, auditors, lawyers, technical advisers (and in each case with those parties’ own advisers); and

- in order to consider and, if thought appropriate, to implement a Disposal of a Joint Venturer Interest (in whole or in part).
- The right to disclose in these circumstances may be qualified, for example by requiring consultation with the OJV prior to disclosure or requiring the party to whom disclosure is to be made to give a confidentiality undertaking. Preferably, the form of such an undertaking should be agreed upon at the same time as the JVA.
- Where the JV arrangement involves a Manager, the JVA must impose confidentiality obligations upon the Manager, but permit unqualified disclosure of confidential information to each of the JVs, and those parties to whom the JVs are permitted to disclose confidential information.

Disposal and Assignment of JV Interest by a GOCJV within Government

- The JVA must allow a Disposal or Assignment of the whole or part of the GOC JV Interest within the GOC corporate group, or to another Government Entity (or preferably multiple Government Entities).
- Such a Disposal or Assignment should not require the consent of the OJV. The JVA should also clearly stipulate that such a Disposal will not trigger an event of default or the exercise of a pre-emptive right.

Dispute Resolution

- Care should be taken to avoid dispute resolution provisions that require lengthy lead times before proceedings can be commenced, or that seek to oust the jurisdiction of the Courts to give urgent interlocutory or final relief.

Limitation on Remedies

- The JVA should not exclude the ability of the GOCJV to apply to the Court for a statutory order for a trust for sale or partition of the JV property.

Related Agreements to the JVA

- The scope and nature of the technical or other support services to be provided by a parent GOC (or the Other Parent) to the JV and the commercial charges to be paid by the JV should be specifically documented in a technical or other support agreement.
- Default provisions in Related Agreements which have the consequence of placing the GOCJV in breach of the JVA should be avoided.
- In the event of a Disposal of the GOC JV Interest, provisions should be made in all Related Agreements that the GOCJV and the parent GOC are discharged of any obligation under the Related Agreements.

(b) Preferable provisions

The following provisions are considered **preferable** for inclusion in all JVAs. Where such provisions are not included, the GOC would be expected to give sound commercial and/or legal reasons as to why such provisions have not been included:

Governing Law and Jurisdiction

- Whether the subject matter of the JV is predominantly based in Queensland, or outside of Queensland, the JVA should stipulate the laws of Queensland as the governing law.
- There is a strong preference that the parties to the JVA submit to the exclusive jurisdiction of the courts of Queensland.

Non-competition

- It is preferred that the JVA or other arrangements not preclude:
 - the GOCJV itself;
 - the GOC parent (or any of its related entities); or
 - another GOC or other Government Entities,
 from competing with the JV itself, the OJV, the Other Parent or its related entities.
- If non-compete clauses are to be considered, close consideration is required as to:
 - whether they are to bind merely the GOCJV itself, the GOCJV and its GOC parent (and related entities), or some other combination;
 - the relevant market (both geographic and product); and
 - the degree of competition that is permitted before breaching the noncompete clause.

Pre-emptive Rights

- It is preferred that JVAs do not confer pre-emptive rights upon the OJV. If preemptive rights cannot be excluded entirely, the JVA should clearly define the trigger event, and make it clear that the use of confidential information to conduct a market sounding for the purposes of identifying a prospective pool of purchasers for the GOC JV Interest is not a trigger event.

Disposal of JV Interest to Third Parties

- Where the OJV requires the right of consent to a Disposal of the GOCJV Interest to a third party, the OJV must be expressly required to act reasonably, and the discretion of the OJV to withhold consent should be limited to considerations of the objective financial and technical capability of the incoming party to perform the obligations under the JVA. The provision should clearly exclude the relevance of other considerations such as the continuance of the particular benefits enjoyed under the JVA or Related Agreements with the GOCJV. The JVA should provide as to when consent is deemed to be unreasonably withheld.
- If the JVA provides for a Deed of Covenant or other document to be executed between existing participants and an incoming participant, there should be a standardised agreed document annexed to the JVA. The JVA should allow reasonable and defined timeframes in which the OJVs must execute the document, otherwise they are deemed to have executed the document.

4.0 Definitions

In this document (whether used in a singular or plural form):

“Controlled entity” means if the entity is subject to the control of another entity. Control means the capacity of an entity to dominate decision-making, directly or indirectly, in relation to the financial and operating policies of another entity so as to enable that other entity to operate with it in pursuing the objectives of the controlling entity.

“Dispose” and **“Disposal”** mean entry into a transaction that effects a change in the ownership of a JV Interest, whether effected by a change in control of the GOCJV or by a disposal of the GOCJV Interest itself by the GOCJV to another entity.

“GOC JV Interest” for an unincorporated JV is the interest that the GOCJV has in the joint venture, which will usually be a bundle of contractual rights and obligations in the JVA and ancillary agreements.

“GOCJV” means an entity which is a GOC or a GOC subsidiary that directly holds a GOC Joint Venture Interest.

“Government Entity” means an entity ultimately owned and/or controlled by the State of Queensland.

“Joint Venturer” means an entity that directly holds a JV Interest.

“JV” means an unincorporated joint venture.

“JVA” means a joint venture agreement.

“JV Manager” means an entity which supplies management services to the JV.

“OJV” means other joint venturer i.e. an entity which is not a Government Entity that directly holds a JV Interest in a joint venture with the GOC.

“Other Parent” means the holding company (as that term is used in the Corporations Act 2001) corporation of the OJV.

“Parent GOC” means the holding company (as that term is used in the Corporations Act 2001) corporation of the GOCJV.

“Pre-emptive Right” means the right of the OJV whereby upon the occurrence of a defined trigger event, the GOCJV is compelled to offer to sell its share in the joint venture to the OJV.

“Related Agreements” mean any other agreement which is ancillary to the JVA and includes agreements between the GOCJV and/or the parent GOC and:

- (a) third parties such as suppliers of goods and services, or persons acquiring goods and services from the JV;
and
- (b) the OJV and/or the JV Manager for the provision of technical or other support services by the GOCJV and/or the Parent GOC.