



Building With Others: Structuring Options

Builders proposing to carry out a particular building project with another party (for example, a developer or another builder) in what the industry might loosely call a “joint venture”, need to address the legal entity which best suits their purposes.

There are many ways to structure this entity and from a commercial view, it is important to ensure that before a tender is submitted or a building contract is signed, the relevant options are fully explored. The most desirable structure will depend on a wide range of commercial and legal factors. However, the general structures that builders might utilise are:

- A. incorporated joint venture;
- B. unincorporated joint venture;
- C. partnership or limited partnership;
- D. unit trust.

Incorporated Joint Venture

An incorporated joint venture is an incorporated company. The shares in the company are held by the joint venture parties in proportion to their interest in the joint venture. Usually there is a **shareholders agreement** between the parties. An incorporated joint venture can give the advantage of limited liability (i.e. risk is largely isolated to the joint venture company). The trade off is potential personal liability of the directors of the joint venture company under the *Corporations Act* and the common law.

Unincorporated Joint Venture

An unincorporated joint venture is a joint venture where the relationship between the joint venture parties is established by **joint venture agreement**. The advantages of utilising an unincorporated joint venture include that the joint venture (while being similar to a partnership) is not governed by the *Partnership Act*. The relationship between the parties is established by contract and the terms of the relationship is what the parties agree.

Partnership

A partnership is a legal relationship which exists between persons who carry on a business in common with a view to profits. Partners are jointly and severally liable for all debts of the partnership. This arrangement usually requires a written **partnership agreement**. The major disadvantage of this structure is that each partner will face unlimited liability for debts and obligations of the partnership, even if not due to acts or omissions committed by the partner. In contrast, shareholders in an incorporated joint venture company can have limited liability.

Limited Partnership

A *limited partnership* has a general partner and a limited partner. The general partner manages the business of the partnership and the limited partner cannot take part in management. General partners are subject to unlimited liability and a limited partner is liable only to the extent of the capital they contribute to the **partnership**. However, a limited partner will lose the benefit of the limitation of liability by taking part in management.

Unit Trust

A unit trust is a legal arrangement where property (such as land, a building or an interest in a contract etc) is held by one person (the trustee) for the benefit of other persons (the beneficiaries) on the terms of a **trust deed** and a **unitholders agreement**. A unit trust is a trust where the beneficial interest in the trust property is divided into units. Control of the operations of the trust will rest with the trustee, which would usually be a company.

The advantages of a unit trust include possible taxation advantages and that units may be independently dealt with, like shares in a company. In some cases a unit trust can be more flexible than a company structure. One of the disadvantages of this structure is that unitholders may be liable to indemnify the trustee against liabilities incurred by the trustee. Taxation and transfer duty issues may also arise when one party wants to transfer units in the trust or the beneficiaries wish to wind up the trust.

General Issues

There are other structures that builders could consider using in projects that they undertake with other parties. There will be a range of commercial, taxation and legal issues and constraints that will need to be considered in relation to a certain project and certain parties.

Whatever structure that you use, there will be a number of common issues that the parties will need to consider. E.g, the power and control that can be exercised by the majority/minority parties, guidelines for board meetings, board representation and voting power, default mechanisms, rights of pre-emption, buy-out mechanisms and so on.

This article was prepared by Luke Paterson, solicitor and first published in the Master Builders Association Reporter Publication October 2009.