

## THE DEFINITION OF PARTNERSHIPS

### The definition of a partnership

PA s 1: *Partnership is the relation which exists between persons carrying on a business in common with a view of profit and includes an incorporated limited partnership.*

### 5 Power of partner to bind firm

#### *Carrying on a business*

PA s 45 "business" includes trade, occupation and profession

Implies a repetition of acts and 'excludes the case of an associated formed for doing one particular act which is never repeated.

#### Smith

F syndicate for the purpose of buying a block of land and subdividing it

H not such a series of acts contemplated being done by the syndicate as a means of carrying on business

#### *in common*

To constitute a partnership the business must be carried out by, or on behalf of, all the partners

#### *view of profit*

The partners must intend that the outcome of the business association be profit, rather than just a sharing in the product of the enterprise

*United Dominions Corp*

## Rules and indicia for determining existence of partnership

### Sharing net profits

Prima facie evidence of partnership, but does not itself create PA: s2(1)(3)

Excludes where

- Excludes payment of debt by giving share of profits
- Excludes remuneration of servants/agents by giving them share of profits
- Excludes annuities to widow/children of former partner by giving them share of profits
- Excludes paying back loan interest with share of profits instead

Note if borrower goes bankrupt – lender gets money back after creditors: s3

Depend on the degree of management and control over the business that the financier has

### Sharing of losses      Not essential

PA s 24(1)(1)      Equal contributions to losses in the absence of agreement to the contrary

### Status of principal

The liability of one partner for the acts of his co-partner in truth the liability of a principal for the acts of his agents

### Management participation      Not essential

### Mutual trust and confidence

Fiduciary duties owed by partners to each other which flows from it, may be displaced by contrary provision in the particular partnership agreement, perhaps to the point of excluding the fiduciary duty

### Contribution of capital      Not essential

[PA 2(1)] Joint or part ownership of property does not of itself create a partnership as to anything so owned whether profits made by its use are shared or not

## PRINCIPAL CHARACTERISTIC OF PARTNERSHIP

**A partnership is not recognised by Australian law as a distinct legal entity**

**Partners bear unlimited liability for debts and obligation incurred**

Agency to bind fellow partners

Acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which the partner is a member, binds the firm and the other partners unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom the partner is dealing either knows that the partner has no authority, or does not know or believe the partner to be a partner. [PA s 5 (1)]

Limited partnerships allow for limitations of the liability of some partners

Limited partners contribute to capital and share profits but have no right to participate in management of the partnership

- Liability is limited to capital contribution to the firm [PA s 67]
- Registration required / Identity of Partners / Limited liability [PA s 54]

*Peckham v Moore*

F Peckham a professional rugby player entered a contract of employment with Canterbury Bankstown Rugby League Football club, an unincorporated association. Applied for workers compensation for injury sustained in 1972 and named those on the committee in 1970.

H Relevant employers of the workers were not person who were functioning as members of the 1970 committee, but would appear to be those who were functioning as members of the 1972 committee.

### **Unincorporated joint ventures**

*United Dominions corporation Ltd v Brian Pty Ltd*      Product specialisation

F – SPL engaged in promoting two distinct but related "joint ventures" involving the development of land. A "collateralisation clause" which, unknown to Brian, was contained in each of the three mortgages executed by SPL in favour of UDC to secure borrowings for the joint venture.

H - Whether or not the relationship between joint venturers is fiduciary will depend upon the form which the particular joint venture takes and upon the content of the obligations which the parties to it have undertaken. If the joint venture takes the form of a partnership, the fact that it is confined to one joint undertaking as distinct from being a continuing relationship will not prevent the relationship between the joint venturers from being a fiduciary one.

## WEEK 4 - DIFFERENT TYPES OF BUSINESS ENTITIES

### CHOICE OF FORM OF BUSINESS ASSOCIATION

#### The diversity of business forms and functions

##### The forms of business associations

Restrictions on size of partnerships and associations

CA 115 Prohibits the formation of a partnership or association that

- (a) has as an object gain for itself or for any of its members; and
- (b) has more than 20 members.

CR reg. 2A.1.01 specifies upper size limits for particular partnership i.e. medical practitioners (50) / Legal practitioners (400) / Accountants (1,000)

#### A special form of incorporation for Indigenous Australians

*Corporations (Aboriginal & Torres Strait Islander) Act 2006* (Cth)

Only requires majority of members and directors to be Indigenous

#### Sole trader

Individual conducting business alone without the benefit of any legal structure or entity status distinct from that of the individual who conducts it

**Co-operatives** Co-operatives Act 1992 (NSW) Voluntary –Principles [6] International Co-operative Alliance [76]

Liability

Limited liability for members and provide an alternative incorporate form for the pursuit of business as well as non-profit.

#### Incorporated associations

Associations Incorporations Act 2009 (NSW)

[3] small-scale, non-profit and non-commercial activities

*Application for registration [AIA 6]*

Permits an association of five or more persons formed for a lawful object to apply

*Nature of association [AIA 26]*

A member of an association (including a committee member and the public officer) is not, merely because of being such a member, liable in relation to the association's liabilities or the costs, charges and expenses of the winding up of the association.

*Association not to provide pecuniary gain for its members [AIA 40]*

#### Factors affecting the decision to incorporate

Limited liability

Perpetual succession

Financing

Cost, formality and continuing obligations

Taxation

**As a matter of commercial practice, a bank, trade creditor or anyone else providing finance or credit to a company may ask a director of the company:**

- for a personal guarantee of the company's liabilities; and

## THE PROCESS OF INCORPORATION UNDER THE CORPORATIONS ACT

### Applying for registration [CA 117]

To register a company, a person must lodge an application with ASIC

- the type of company that is proposed to be registered
- the company's proposed name (unless the ACN is to be used in its name)
- name and address of each person who consents to become a member, director or secretary of the company
- proposed registered office and, if different, proposed principal place of business
- Details of proposed share capital and guarantee obligations
- If the company chooses to have a company name distinct from the CAN, it may reserve the proposed name prior to incorporation [CA 152]. A name is available for reservation unless it is identical to a name (a) reserved or registered by another company, (b) registered on the Business Names Register in respect of another person or (c) is a kind declared by regulations to be unacceptable [CA 142]
- Reg 2B.6.01 and Sched 6 – Olympic / Building Society / Stock Exchange / Made in Australia / Trust

### ASIC gives company ACN, registers company and issues certificate [CA 118]

### Company comes into existence on registration [CA 119]

A company comes into existence as a body corporate at the beginning of the day on which it is registered. The company's name is the name specified in the certificate of registration.

### Members, directors and company secretary of a company [CA 120]

(1) A person becomes a member, director or company secretary of a company on registration if the person is specified in the application with their consent as a proposed member, director or company secretary of the company.

(2) The shares to be taken up by the members as specified in the application are taken to be issued to the members on registration of the company.

### Legal capacity and powers of a company [CA 124]

### A company's name [CA 148]

Limited liability companies must have "*Limited*" at the end of its name unless section 150 or 151 applies. A limited proprietary company must have the words "Proprietary Limited" at the end of its name. An unlimited proprietary company must have the word "Proprietary" at the end of its name. A no liability company must have the words "*No Liability*" at the end of its name.

### Certificate of incorporation

Conclusive evidence that all requirements for incorporation have been complied with, and that the company is duly incorporated [CA 1274(7A)]. Presumption of conclusiveness absolves persons dealing with a company from inquiry as to whether the requirements for incorporation have been met.

### Contracts before registration [CA 131]

A company may ratify a contract made on its behalf or for its benefit prior to its registration within an agreed period of time. If however the company is not registered or does not ratify the contract, the person making the contract for the company is personally liable for damages.

Anti-delaware clause [119A]

## Rules for the internal management of a company

**The Corporations Act contains a basic set of rules for the internal management of a company (appointments, meetings etc.).**

## THE TYPES OF COMPANY UNDER THE CORPORATIONS ACT

Types of companies [CA112]

Proprietary companies	Limited by shares
	Unlimited with share capital
Public companies	Limited by shares
	Limited by guarantee
	Unlimited with share capital
	No liability company

A company is not registered as a propriety company, it falls within the residuary category of a public company [CA 9]

### Proprietary companies [CA 113]

A company must have no more than 50 non--employee shareholders

If ASIC is satisfied that a company has contravened these prohibitions, ASIC may direct the proprietary company to change to a public company [CA 165]

*Minimum of 1 member [CA 114]*

Single director/single shareholder proprietary companies [201F]

### Trade unions cannot be registered [CA 116]

#### The nature of share capital

Share capital is a device to allocate certain rights, risks and functions among participant in the business venture.

#### The share capital fund

Share capital fund is the amount, in money or money's worth, which members of the company agree to contribute permanently to the company in their capacity as members to fund the joint enterprise or activities. On winding up, holders of share capital are the lowest ranked claimants upon the assets of the company.

#### Shares in the company

A share is simply a proportionate interest in the net worth of the business or undertaking of the company.

#### The rights attached to shares

The rights attaching to shares are of two broad species: to participate in financial distributions and in the governance of the company.

#### Companies limited by shares

A company formed on the principle of having the liability of its members limited to the amount (if any) unpaid on the shares respectively held by them.[CA 9]

If the company is a company limited by shares, a member need not contribute more than the amount (if any) unpaid on the shares in respect of which the member is liable as a present or past member. [CA 516]

#### Companies limited by guarantee

A company formed on the principle of having the liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up. [CA 9]

If the company is a company limited by guarantee, a member need not contribute more than the amount the member has undertaken to contribute to the company's property if the company is wound up. [CA 517]

#### Companies limited by both shares and guarantee

Companies may no longer be registered as companies limited by both shares and by guarantee.

#### Unlimited companies

A company whose members have no limit placed on their liability [CA 9]