

## Table of Contents

<b>Lecture 1: Business Structures</b> .....	<b>3</b>
Chapter 1: Regulatory Framework .....	6
Chapter 2: Registration and its Effects.....	8
Chapter 3: Types of Companies .....	12
Chapter 7 (Symes et al): .....	15
seminar 1 (Week 2) Corporate Law .....	26
<b>Lecture 2: The Company</b> .....	Error! Bookmark not defined.
Readings: Chapter 4 .....	Error! Bookmark not defined.
Readings: Chapter 5 .....	Error! Bookmark not defined.
Seminar 2 .....	Error! Bookmark not defined.
<b>Lecture 3: ASIC and Ethics</b> .....	Error! Bookmark not defined.
Readings Chapter 21 .....	Error! Bookmark not defined.
Journal Article – Corporate Fraud: See, Lawyers.....	Error! Bookmark not defined.
Seminar 3 .....	Error! Bookmark not defined.
<b>Lecture 4: Shares, Transactions and Debt Capital</b> .....	Error! Bookmark not defined.
Readings: Chapter 8 Share Capital.....	Error! Bookmark not defined.
Readings: Chapter 9 Membership .....	Error! Bookmark not defined.
Readings: Chapter 10 Dividends .....	Error! Bookmark not defined.
Seminar 4 week 5.....	Error! Bookmark not defined.
<b>Lecture 5: Financial Reporting, Shareholders' Meetings and Auditors</b> .....	Error! Bookmark not defined.
Readings: Chapter 14 shareholders' meetings .....	Error! Bookmark not defined.
Readings: Chapter 15 Financial Reporting and Disclosure .....	Error! Bookmark not defined.
Readings: Chapter 16 Auditors.....	Error! Bookmark not defined.
Seminar 5 week 6.....	Error! Bookmark not defined.
<b>Lecture 6: Director's Duties</b> .....	Error! Bookmark not defined.
Readings: Chapter 13: Directors Duties .....	Error! Bookmark not defined.
Readings: Ch 13.1 Corporate Governance .....	Error! Bookmark not defined.
Readings: Ch 13.2 Good Faith and Proper Purpose .....	Error! Bookmark not defined.
<b>Lecture 7: Duties of skill, care and diligence</b> .....	Error! Bookmark not defined.
Readings: Chapter 13.3 Conflicts of Interest and Disclosure .....	Error! Bookmark not defined.
Readings: Chapter 13.4 Duties of Care, Skill and Diligence.....	Error! Bookmark not defined.
<b>Lecture 8: Insolvency and Remedies and Penalties for Breach</b> .....	Error! Bookmark not defined.
Readings: Ch 13.5 Directors of Insolvent Companies .....	Error! Bookmark not defined.
Readings: Ch 13.6 Remedies and Penalties for breach of duty .....	Error! Bookmark not defined.
Exoneration and relief for breach of duty.....	Error! Bookmark not defined.

**Lecture 9: Member's Remedies** .....Error! Bookmark not defined.

Readings: Chapter 17 Members REmedies .....Error! Bookmark not defined.

Seminar 9 .....Error! Bookmark not defined.

**Lecture 10: Receivership and Voluntary Administration** .....Error! Bookmark not defined.

Readings: Chapter 23 Receivership .....Error! Bookmark not defined.

Readings: Ch 24 Voluntary Administration .....Error! Bookmark not defined.

Seminar 10.....Error! Bookmark not defined.

**Lecture 11: Liquidation** .....Error! Bookmark not defined.

Readings: Chapter 25 Liquidation.....Error! Bookmark not defined.

Seminar 11.....Error! Bookmark not defined.

# LECTURE 1

- Sole trader – difficult to raise capital from banks/potential investors through a market.
- Incorporated Limited Partnership: uses elements of corporate law to benefit partnerships. Only available in certain circumstances.
  - Not indicative of a partnership: Holding property jointly; sharing of gross returns.
  - Sharing of profits is prima facie evidence of partnership.
    - Note distributions that do not form part of this in slides.
- Corporation not necessarily a company in Australia/UK.
  - Corporation covers more than just companies.
- Trading trusts, Managed investment schemes, Incorporated Associations - what is on the slides is sufficient.
- Employees are a company's largest creditor – accrued work done until paid.
- *Salomon v Salomon* [1987] HoL: In *Salomon*, the company granted the debenture-holder (initially Mr Salomon) a charge over its assets as security for the £10,000 loan.
  - Level of involvement not relevant – once legal requirements satisfied, sufficient to treat as a separate legal entity.
  - Veil of corporation not pierced here. However, see pg 40-44; *Lee v Lees Air Farming*
- 1. The constitution of a proprietary company, as distinct from the Corporations Act, might:
  - Require the company to have a secretary;
  - Require the company to have an annual general meeting;
    - Empower a general meeting to remove a director by ordinary resolution at any time.
- 2. Some other important differences between public and proprietary companies are:
  - (a) Proprietary companies are limited in the ways they can seek to raise share or loan capital: see CA s 113.
  - (b) Provisions of the legislation such as the 'related party' provisions of Chapter 2E and s 195 only apply to public companies.
- Note that, in determining the value of the gross operating revenue and gross assets, the revenue and assets of entities controlled by the proprietary company must be included.
  - As to when a company controls an entity see CA s 50AA.
  - A proprietary company which is not a 'small pty co' in a financial year is a 'large pty co': see CA 45A.
- The term 'balance sheet' is applied to a financial statement which essentially discloses as at the 'balance date' which is usually June 30:
  - The capital contributed by members to the company;
  - The gross value of the company's assets; and
  - The gross value of the company's liabilities/debts.
  - The balance sheet thus provides a snapshot of the company's overall financial position as at the balance date.
- 5. A company's profit and loss statement indicates how much a company has earned in a particular accounting period (eg 3, 6 or 12 months) and how much the company has expended to make those earnings. Where a company has expended more than it has earned, it has traded at a loss. However, a company that is trading at a loss is not necessarily unable to pay its debts as they fall due, or 'insolvent' as that term is defined by CA s 95A.
- 6. The 'financial year' of most companies is the period between July 1 of a calendar year and June 30 of the following calendar year. However, the Corporations Act does not define the term 'financial year' this narrowly: see CA s 323D.
- Unlimited company with share capital not preferred – however, mandatory for some professions such as lawyers and accountants.

- Members can be called on to contribute to the company where the company cannot discharge its debts. May even be able to call on past members under ss 520, 521, 523
- other types of company have a conditional power to return share capital to their members without obtaining court approval: see CA Chapter 2J Part 2J.1.
- 'Share capital' is the amount that a company has raised by issuing shares to its members.
- The rules of professional practice in some jurisdictions may allow practising members to form a body corporate to conduct the practice. However, this is often conditional on the practitioners continuing to have the same liability status as ordinary partners vis-à-vis their clients [ie unlimited personal liability]. The unlimited liability company satisfies such rules while also allowing the practitioners to secure the benefits of corporate status.
- Note that the effect of CA s 258A is that an unlimited company does not have to comply with CA Pt2J.1 when returning share capital to its members – an unlimited company may reduce its share capital in any way.
- Company limited by guarantee:
  - The amount of the guarantee agreed to be provided by each of the company's initial members will be stated in the company's registration application: see CA s 117(1)(m).
  - A company's constitution will usually state the amount of the guarantee.
  - A company may be able to alter its constitution to increase the amount guaranteed: s 136(1). However, such an increase will only be binding on those who are members at the time of the change if they agree in writing to be bound: see s 140(2)(b).
  - A company limited by guarantee might not be able to reduce the amount guaranteed because this could unfairly prejudice creditors of the company: cf *Hennessy v National Agricultural & Rural Development Assn* [1947] IR 159.
  - 5. Companies limited by guarantee are normally unsuitable for trading ventures because they cannot raise share capital from their members whilst they are going concerns. However, under their constitutions, they might have the power to levy annual, or other periodic, subscriptions and to impose special purpose levies.
  - Companies limited by guarantee are sometimes used to conduct not-for-profit activities.
  - Many sporting and philanthropic groups operate under the umbrella of this corporate form.
  - Examples of companies limited by guarantee are:
    - Adelaide Symphony Orchestra – which has a mixture of company structures. ASO Holdings Ltd is a public co limited by guarantee, but it holds all the shares in ASO Pty Ltd, a proprietary co limited by shares, according to its 2011 Annual Report - The Company is the holder of 213,002 ordinary shares in Adelaide Symphony Orchestra Pty Limited and is entitled to one vote per share at shareholders' meetings.
    - 1986, the SANFL formed a company, Adelaide Football Club Incorporated, with all issued shares in the said company owned by the league. This is a public company limited by shares and guarantee. This type of company can no longer be registered following amendments in 1998, and there are very few of them in existence. Port Adelaide Football Club Ltd by contrast, is a company limited by guarantee only registered in 1995.
- No liability companies:
  - 'Mining purposes' means all or any of the following purposes:
    - Prospecting for ores, metals or minerals;
    - Obtaining by any mode or method, ores, metals or minerals;
    - The sale or other disposal of ores, metals, minerals or other products of mining;
    - The carrying on of any business or activity necessary for, or incidental to, any of the foregoing purposes;

- Whether in Australia or elsewhere, but does not include quarrying operations for the sole purpose of obtaining stone for building, road-making or similar purposes: CA s 9.
- 2. The term 'call' refers to a company calling up [ie requiring payment of] some or all of the amount currently unpaid in respect of the issue price of shares. Thus a company is said to 'make a call' in respect of its partly-paid shares.
- The no liability company was introduced to encourage investment in unproven or speculative mining ventures.
- It allowed investors to acquire partly paid shares without having to throw good money after bad should calls be made on the shares.
- Any proceeds of sales at a public auction must be applied in the manner set out in s 254Q(11). First, the expenses of the sale must be paid; then any forfeiture expenses; third, the calls on the shares that are due and unpaid must be paid. Any (unlikely) remaining balance must be paid to the member whose shares were sold. So, any amount paid up on the share is not 'refunded', unless there are sufficient funds from the auction to meet the first three items here.
- No liability companies usually convert to public companies limited by shares once they enter the production phase. This conversion is possible under CA s 162(1) but only if all of the company's shares are fully paid up.
- Unrelated parties means those parties that are not employees/relatives.

# CHAPTER 1: REGULATORY FRAMEWORK

## *What is a Company?*

- A company is an artificial entity recognised by the law as a legal person with its own rights and liabilities.
  - As a company is distinct from its directors and shareholders, it may own property, enter into contracts and sue and be sued in its own name.
  - A company enjoys limited liability which means that shareholders are not personally liable for their company's debts.
    - Shareholder liability limited to paying the issue price of the shares that they own which includes any unpaid amount on partly paid shares.
- The Corporations Act makes a formal distinction between ownership and control of companies.
  - Shareholders are regarded as the owners of a company in a non-legal sense.
    - Contribute capital in the form of paying the issue price on shares and may receive dividends.
  - Every company must have directors known as the 'board'.
    - Generally have exclusive power to control management of the company's business, per the company constitution.
    - Strict fiduciary and statutory duties because of the control.
- Proprietary companies are divided into two subcategories – small and large.
  - Distinction is based on the scale of the company's business.
- Corporations Act intended to be read in conjunction with the case law, which gives the legislation more precise meaning.

## *Development of Australian Company Law*

- *Huddart Parker v Moorehead* (1909) CLR: Constitutional power to make laws with respect to companies that had already been formed only.
  - *NSW v Cth* (1989) CLR: reaffirmed *Huddart Parker*.
  - As a result of the enactment of the referral legislation by the States, the Commonwealth passed the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act).

## *Australian Securities and Investments Commission*

- ASIC main body responsible for administering the Corporations Act.
  - Section 1(2) outlines objectives.
  - Section 11(1) provides ASIC has such functions and powers as are conferred on it by or under the corporations legislation.
    - Section 5(1) defines corporations legislation to mean the ASIC Act and the Corporations Act.
  - ASIC's 11 functions and powers do not apply to the 'excluded provisions' of the corporations legislation (those functions set out in s 12A).
- The Treasurer may give written directions to ASIC about the policies it should pursue and the priorities it should follow: s 12.
  - An opportunity to discuss the proposed direction is required.
  - ASIC must maintain independence from the executive arm of government.
- Anyone is able to access ASCOT to obtain publically accessible information about companies.
  - Any written material that purports to have been prepared by ASIC from information contained in the ASCOT database is admissible as prima facie evidence, in the absence of evidence to the contrary, as proof of the information contained in it and is admissible in court proceedings as evidence without formal certification of its accuracy: s 1274B.

- ASIC is solely responsible for the supervision and enforcement of laws dealing with misconduct of participants in relation to financial markets.
- Takeovers:
  - Bidder's statement required to be sent to ASIC prior to the offer being sent to shareholders.
  - ASIC can grant exemptions from, or modify the application of, the takeover provisions.
    - Pt 6.10, Div 2 enables ASIC or any person whose interests are affected by an order affecting a decision of ASIC or a declaration that unacceptable circumstances have occurred in relation to an acquisition of shares.
- ASIC can instigate civil proceedings where it forms the opinion that it is in the public interest to do so: ASIC Act s 50.
  - May be brought in the name of a company against its directors for the recovery of damages for fraud, negligence, default, breach of duty or other misconduct.
  - Can also bring criminal proceedings where it believes an offence against the corporations legislation has been committed and the person ought to be prosecuted: s 49.
- ASX:
  - Ensures the integrity of the financial markets so that they operate in a fair, orderly and transparent manner.

### *Takeovers Panel*

- Only ASIC or another public authority has the power to commence court proceedings in relation to a takeover bid before the end of the bid period: CA s 659B
  - A person's right to commence court proceedings about a takeover bid is delayed until after the end of a takeover bid period.

### *Financial Reporting System*

- Financial Reporting Council: Provides oversight for the key elements of the financial reporting system – ensure it is coherent and effective and in alignment with a common policy direction.

## CHAPTER 2: REGISTRATION AND ITS EFFECTS

- Shareholders do not have a proprietary interest in the property of the company.<sup>1</sup>
- Limited liability:
  - Facilitates enterprise as it encourages economic activity by separating investment and management functions and shielding investors from any corporate loss in excess of their equity capital.
  - Reduced Monitoring as the risk of a company's failure is confined to the loss of the equity invested.
  - Promoting market efficiency – shares can be freely traded.
  - Encouraging equity diversity – encourages investment in a number of companies which may not have been viable had limited liability not existed.
- *Salomon v Salomon* [1897] AC:
  - As long as the necessary formalities of incorporation were satisfied, a new entity comes into existence that is separate and distinct from its directors and shareholders.
  - Facts:
    - S was a boot manufacturer and operated as a sole trader
    - Wanted to give family a share of business so duly incorporated but was essentially a 'one-man' company.
- *Lee v Lee's Air Farming* [1961] AC:
  - Facts:
    - L was a pilot who formed a company and allotted all but one of the share capital on issue to himself. Bought workers compensation naming himself as an employee.
    - Insurance agency rejected wife's claim upon L's death as they considered that L could not be a worker of the company if he had full control of it.
  - Held:
    - As the company is a separate legal entity from its founder, it could enter into a contract of employment with Lee.
- *Macaura v Northern Assurance* [1925] AC:
  - Facts:
    - M owned land which stood timber. Sold the land and timber to a company he formed and received as consideration all the fully paid shares.
    - A fire destroyed all the timber – M had earlier insured the timber against loss by fire in his own name but had not transferred the insurance policy to the company.
  - Held:
    - Only the company could insure its property against loss or damage – shareholders have no legal or equitable interest in their company's property.
      - This is the case with companies that have one or many shareholders.
  - Consider: *Insurance Contracts Act 1984* (Cth) which dispenses with the common law requirement of insurable interest and may now overcome this decision.
    - Nor provides that where an insured, under a general insurance contract, suffers a pecuniary or economic loss by reason of damage to or destruction of the insured property, the insurer is not relieved of liability just because the insured did not have a legal or equitable interest in the property.
      - Loss being decline in share value in M's case.
- *MacLeod v The Queen* (2003) CLR:
  - Shareholder can be found to be stealing company property (even if there is only one shareholder).
- *Walker v Wimborne* (1976) CLR:

---

<sup>1</sup> *Macaura v Northern Assurance* [1925] AC.



- Facts:
  - Directors had used the assets of one company as security for loans obtained by others
- Held:
  - Directors of a company that is a member of a group cannot act in the best interests of the group and disregard the interests of that company's shareholders and creditors.
- *Industrial Equity v Blackburn* (1977) CLR:
  - A subsidiary's profits cannot be regarded as the profits of its holding company available for payment of the holding company's dividend.
- *Adams v Cape Industries*:
  - Distinction drawn between situations where a parent company itself carried on business in a foreign country and the case where it traded in a foreign country through a subsidiary over which it exercised full control.
    - In the latter case, the parent company was not a resident of the foreign country so as to be subject to the jurisdiction of the courts where the subsidiary carried on business.
    - It was held that the economic inter-relationship of the companies did not justify piercing the corporate veil and departing from the *Salomon* principle.
  - The corporate veil can be lifted where the subsidiary is a façade.

### Piercing the Corporate Veil

- By Statute:
  - Directors may become personally liable for debts incurred by their company – arises where directors breach the duty contained in s 588G by failing to prevent the company incurring debts when there are reasonable grounds for suspecting that it is insolvent.
    - Liable to pay compensation an amount equal to the loss or damage suffered by unsecured creditors in relation to the debts so incurred because of the company's insolvency: ss 588J, 588K and 588M.
      - Compensation payable to liquidator who distributes it to unsecured creditors.
    - May also result in civil penalties: Pt 9.4B
    - If failure to prevent the company incurring the debt was dishonest, it may be considered a criminal offence: s 588G(3).
  - The company's liquidator can set aside any uncommercial transaction entered into within two years of the commencement of winding up: s 599FE(3).
    - Such a transaction results in the recipient receiving a gift or obtaining a bargain of such magnitude that it could not be explained by normal commercial practice.
    - Corporate insiders treated differently from others that have dealings with the company.
- Common Law:
  - Corporate veil is pierced only in relatively rare situations to prevent the abuse of the corporate legal personality of a company where it is used as a façade or sham to evade the law or to frustrate its enforcement. Two types of situations -
    - *Prest v Petrodel Resources*:
      - The court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement.
      - Evasion principle: piercing the corporate veil.

- Concealment principle: where a company is interposed so as to conceal the identities of the persons behind the company.
- *Re Darby* [1911] KB:
  - ‘Dummy company’ formed for the purpose of enabling to perpetrate a fraud required the profit to be disgorged.
  - Court looked behind the façade of the legal entity.
- *Gilford Motor v Horne* [1933] Ch:
  - Company considered a ‘mere cloak or sham’ used as a device for enabling contractual obligations to be avoided resulting in an injunction being granted against the company even though the company was not a party to the contract with the plaintiff.
- *Ascot v Harper* (1981) CLR:
  - Even if a company was not formed for the purpose of avoiding a legal obligation, it may lift the corporate veil if the company was a mere puppet of its controller.
- *Green v Bestobell Industries* [1982] WAR:
  - Court will lift the veil if a company knowingly participates in a director’s breach of fiduciary duties.
- *Tesco Supermarkets v Natrass* [1972] AC:
  - The purpose or intention of a company may be relevant – only with respect to the persons who are regarded as the ‘directing mind and will’ of a company rather than mere employees.

### *Piercing the Corporate Veil of Group Companies*

- *Adams v Cape Industries*:
  - The court is not free to disregard the principle of *Salomon v Salomon* merely because it considers that justice so requires.
- However, the courts sometimes will look behind the corporate veil and treat a group of companies as a single economic entity.
  - A holding company may be personally liable to the liquidator of its subsidiary if it fails to prevent the subsidiary incurring debts while insolvent.
    - Liquidator may recover from the holding company amounts equal to the amount of loss or damage suffered by the subsidiary’s unsecured creditors.
  - Sections 588V – 588X lift the corporate veil of subsidiary companies by making holding companies liable for the debts incurred by their insolvent subsidiaries.
    - The subsidiary must have incurred a debt prior to going into liquidation.
      - A debt is incurred when a company so acts to expose itself contractually to an obligation to make a future payment of a sum of money as a debt.<sup>2</sup>
      - Debt is also an obligation to pay taxes.<sup>3</sup>
- Subsidiaries as agents or partners:
  - May lift the veil where it finds that the subsidiary has acted as an agent for its holding company.
    - Not a true piercing – rather, the court looks behind the veil to ascertain the agency relationship.
  - *Smith, Stone & Knight v Birmingham* [1939] All ER (followed in Australia in *Spreag v Paeson* (1990) ALR:
    - The following six requirements must be established before the *Salomon* principle will be disregarded to support a finding that a subsidiary carried on a business as agent for its holding company:
      1. The profits of the subsidiary must be treated as the profits of the holding company
      2. The persons conducting the business must be appointed by the holding company

<sup>2</sup> *Hawkins v Bank of China* (1992) NSWLR.

<sup>3</sup> *Powell v Fryer* [2001] SASC.

3. The holding company must be the head and brain of the trading venture
  4. The holding company must govern the venture and decide what should be done and what capital should be embarked on it
  5. The profits of the business must be made by the holding company's skill and direction
  6. The holding company must be in effectual and constant control.
- *Pioneer Concrete v Yelnah* (1987) ACLC:
    - Court may be prepared to disregard the corporate veil if there was evidence that companies in a group operated in partnership.
      - Sufficient evidence was not defined.

# CHAPTER 3: TYPES OF COMPANIES

## *Corporations and Companies*

- A corporation consists of many different types of entity and is not limited to a company.
  - Excluded from the CA definition: an exempt public authority; a corporation sole (Public Trustee).

## *Classification according to liability of members*

- There are four types of companies that can be registered, classified according to the extent of the liability of members: s 112(1) (considered in turn):
- Company limited by shares:
  - Section 9: 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.
    - Once shareholders' details are entered on a company's register, they are regarded as members: s 211.
  - If shares are partly paid, a shareholder may be liable to pay the balance with a call being made (or without, if in liquidation s 515).
    - Amount limited to unpaid amount s 516.
  - Past members are only liable if the court is satisfied that the existing shareholders are unable to satisfy the contributions they are liable to make: s 522.
    - Need not contribute if they were not members within one year of the commencement of winding up s 521.
    - Past members not liable for any debt or liability of the company contracted after the past member ceased to be a member: s 520.
- Company limited by guarantee:
  - Members have their liability limited to the amounts that they have undertaken to contribute to the property of the company in the event of it being wound up: s 9.
    - No share capital.
    - Not required to contribute capital while company is operating – only liable to pay up to the amount specified as the members' guarantees in the event of it winding up s 517.
      - Guaranteed amount must be set out in the company's application for registration: s 117(2)(m).
  - Popular for not-for-profit types (sports/recreation-related/community service/educational/religious organisations) as it cannot draw capital from its members (drawback from business' point of view).
  - Past members may be liable – only in respect to those persons who were members within the year prior to the commencement of winding up and not liable to those debts incurred after they ceased to be members.
  - Small company if (45B):
    - Annual revenue is less than \$250K
    - It is not a deductible gift recipient for income tax purposes at any time during the financial year
    - It is not a building society, credit society or credit union.
  - Section 254SA: prohibited from paying dividends to members unless a building society, credit society or credit union.
- Unlimited company:
  - Members have no limit to their liability to the company (s 9).
- No liability company:
  - Company can convert into a NL under s 162: must
    - Have share capital;
    - State in its constitution that its sole objects are mining purposes; and

- Have no contractual right under its constitution to recover calls made on its shares from a member who fails to pay a call: s 112(2).
  - Cannot engage in activities that are outside mining: s 112(3).
- The acceptance of shares does not constitute a contract by the shareholder to pay calls or contribute to the debts and liabilities of the company s 254(M)(2).
  - Shares are forfeited if a call is unpaid 14 days after it became payable s 254Q(1).
  - Forfeited shares must be offered for sale by advertised public auction within six weeks after the call becomes payable: s 254Q(2)(3).
  - A shareholder whose shares have been forfeited may, at any time before the sale, redeem the shares by paying the calls due on the shares and a proportion of expenses incurred in the forfeiture on a pro rata basis: s 254R.
- Limited by both shares and guarantee:
  - No longer able to be registered.

### *Proprietary and Public Companies*

- A public company is a company other than a proprietary company.
- Proprietary company must be either a company limited by shares or an unlimited company with a share capital: s 112(1).
  - Must not have more than 50 non-employee shareholders: s 113(1).
  - Joint holders of shares are counted as one person s 113(2).
  - Must not engage in any activity that would require disclosure to investors under Ch 6D, except for an offer of its shares to existing shareholders or employees of the company or of its subsidiary: s 113(3).
    - Contravention is an offence of strict liability with a maximum 5-penalty unit fine: s 113(3A) or ASIC may require a company that contravenes s 113 to convert to a public company: s 165.
- Proprietary v Public:
  - Less onerous disclosure requirements for pty – cheaper to maintain than public.
  - Both must have at least one member: s 114
    - Section 113: 50 is max for pty; no max for public
  - Pty must have at least one director whilst public must have at least three: s 201A.
    - At least one and two respectively must ordinarily reside in Australia.
  - Public needs a secretary (pty optional): must reside in Australia in either case s 204A(2).
  - Pty prohibited by s 113 from engaging in activity per Ch 6D – cannot raise funds by offering shares or debentures.
    - Public can – must comply with 6D.

### *Large and Small Proprietary Companies*

- A company that does not fit the definition of a small company is considered a large company.
  - Small company if two of the three criteria are satisfied (45A(2)):
    - Consolidated operating revenue for the financial year of the company and the entities it controls is less than \$25 million.
    - Value of the consolidated gross assets at the end of the financial year of the company and the entities it controls is less than \$12.5 million
    - Company and the entities it controls have fewer than 50 employees at the end of the financial year.
      - Part time employees are taken into account as an appropriate fraction of a full time equivalent: s 45A(5).
  - Advantages of small pty companies:
    - Fewer requirements to preparation, lodgment and audit of financial reports.

- Public and large pty companies are required to prepare financial reports (s 292) and have them audited (s 314), while the financial reports and directors' reports must be lodged with ASIC s 319.
  - Required to prepare financial reports only if they are directed to do so by: shareholders holding 5% or more of the voting shares (s 293) or ASIC (s 294).
- Pty can convert to public by passing a special resolution to this effect and lodging an application with ASIC: ss 162 and 163.
  - Per s 165 ASIC may direct a pty company to change to a public company if it is satisfied that the company has contravened s 113.
- Public can convert to pty by passing a special resolution and lodging an application to this effect with ASIC: ss 162 and 163.
  - Must comply with s 113

### *ASX Listed Companies*

- To gain listing, a public company must satisfy the various requirements in ASX Listing Rule 1.
  - Minimum shareholder requirement:
    - 400 shareholders each holding a parcel of shares with a value of at least \$2000; or
    - 350 shareholders each holding a parcel of shares with a value of at least \$2000; or
    - 300 shareholders each holding a parcel of shares with a value of at least \$2000, 50% of whom are unrelated parties of the company.
  - Company size requirement:
    - Profits test – aggregated profit from continuing operations for the last three financial years of at least \$1 million.
    - Assets test – NTA of at least \$2 million
- Enhanced Disclosure securities are securities of a body that is included in a licensed market's official list: s 111AE.

### *Related Bodies Corporate*

- 46(a)(i): the composition of the board of directors is taken to be controlled by another body corporate if the other body can exercise a power to appoint or remove all or a majority of the directors: s 47.
  - The power must be a legally enforceable power to control the composition of the board of directors and not practical or de facto control that arises by a significant shareholding in a company.<sup>4</sup>
- A company is a subsidiary of another if (s 46(a)(ii)):
  - It is in the position to cast more than half the maximum number of votes that might be cast at a general meeting of the company; or
  - It controls the casting of more than half the maximum number of votes that might be cast at a general meeting of the company.
    - A company that has the 'present ability' to cast votes satisfies this test.<sup>5</sup>

### *Foreign Companies*

- Body corporate incorporated outside Australia is referred to as a foreign company and is not permitted to carry on business in Australia unless it is registered with ASIC: s 601CD.

<sup>4</sup> *Mount Edon Gold Mines v Burmine* (1994) ACLC.

<sup>5</sup> *Bluebird Investments v Graf Holdings*.

# CHAPTER 7 (SYMES ET AL):

## *Sole Traders*

- No statute laws apply specifically to sole traders.
- Advantages:
  - Formation:
    - Relatively simple as there are minimum formalities to be met – all that is needed is a place to operate.
  - Control:
    - Total control over the operation of the business.
  - Profits:
    - Exposed to all the profits of the business and can choose to distribute them as they like.
  - Taxation:
    - Taxed on personal income level. Tax liability will be less providing profits remain relatively low and this is their only access to income.
  - Privacy:
    - Little to no regulatory need for sole traders to disclose the details of their business.
  - Dissolution:
    - Easy to dissolve – need only to pay any outstanding tax obligations and debts, notify their customers and either hand the business over to the new owner or shut the door. Death will end the business.
- Disadvantages:
  - Liability:
    - Unlimited liability – personal assets required to satisfy business debts.
  - Risk:
    - All the risk lies with the sole trader – they are exclusively liable.
  - Management:
    - Difficult to manage a business 24/7 – placing trust in other people to run your business, taking time off for holidays or due to sickness.
  - Expertise:
    - Sole trader limited to the expertise they possess – staff may need to be employed with appropriate expertise to assist in the business.
  - Capital:
    - Capital must be funded personally – eg. Loan from the bank. May have to use personal assets as security for a loan or find some third party to guarantee the repayment of that loan.
    - Only a limited amount is generally able to be borrowed. This will confine expansion.
  - Continuity of business:
    - Ceases on the death of the sole trader. May be able to take precautions regarding succession in the will, but the interruption may have dire effects on the business. Difficult to sell as there is no separate legal entity which can be sold to a purchaser.
  - Taxation:
    - If profits grow beyond a certain tax threshold, it may become quite onerous.

## *Partnerships*

- The relationship which subsists between persons carrying on a business in common with a view of profit.
- Carrying on a business:
  1. Business defined as including any trade, occupation or profession

2. On off transaction can be considered as carrying on: *Canny Gabriel Castle Jackson Advertising and Fourth Media Management*.
  3. First transaction can be considered carrying on if it is considered that it is undertaken with the intention that it should be the first of a series of transactions: *Re Griffen; Ex parte Board of Trade*.
- In common:
    1. Not all partners must be actively engaged in the running of the business: *Partnership Act 1891 (SA) s 24(1)€*.
    2. Must be clear that the partners who are running the business are doing so for all partners and not just for themselves.
      - True mutuality of rights and obligations must exist between the partners.
  - With a view of profit:
    1. Requirement is to ensure that not for profit organisations do not amount to partnerships as a matter of law.
  - Formation of a partnership:
    1. Written Agreement:
      - Court will attempt to give meaning to the partnership agreement even if this means overriding the provisions of the Partnership Act.
        - Where the agreement is silent, the Act will be used to fill the gaps.
    2. Oral agreement:
      - Can be done – no written documentation for a court to examine in the event of a dispute though.
    3. Impliedly by conduct:
      - If the parties by their words or conduct lead others to believe that a partnership exists, they will be stopped or estopped from denying the existence of a partnership.
  - Eligibility to be a Partner:
    1. Minors:
      - Restricted capacity to enter into contracts – possible to be a partner but not recommended as they can escape contracts entered into during their minority, unless the contract is for necessities.
      - If a partnership of which a minor is a partner becomes liable to an outsider, the other adult partners are liable for the minor's share of the firms debt as well as their own share.
        - Adult partners have no right of indemnity against the minor
    2. Bankrupts:
      - Must disclose that they are an undischarged bankrupt but otherwise can be a partner.
  - Rules for determining whether or not a partnership exists:
    1. Intention:
      2. What the parties intend is manifested by their words and actions. The court looks objectively at the action of the partners to determine whether the parties intended to be partners: *Canny Gabriel Castle Jackson Advertising and Fourth Media Management*.
    3. Agency:
      - Proof of each party acting as an agent for the other party or parties in a business relationship may indicate the existence of partnership but this is not necessarily conclusive.
    4. Sharing of profits and losses:
      - Indicates a partnership but not conclusive.
    5. Statutory rules:
      1. Co-ownership:
        - Of property – does not amount to partnership regardless of profit sharing.



- Includes holding property jointly, whether as joint tenants or tenants in common, but does not itself create a partnership.
  - Only if involved in business carried on mutually.
- 2. Sharing of gross returns:
  - Does not of itself create a partnership: s 2(1)(b).
- 3. Sharing of profits and losses:
  - The receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business but does not of itself make that person a partner.<sup>6</sup>
  - Payment of a debt will not make a creditor a partner; payment to an employee or a deceased partner does not make these recipients partners.

### Types of Partnerships Covered by the Partnership Act

- General Partnerships:
  - Liability of each partner is unlimited.
    - If the assets of the firm are insufficient to satisfy its debts, the creditors look towards each partner's own assets.
    - The partner with the greater amount of personal assets may have to bear a greater portion of the liability.
      - May be pursued until bankruptcy is declared.
  - Size:
    - Must be a minimum of 2 and a maximum of 20 in a general partnership.
      - Outsized incorporated partnerships, whose maximum number can exceed 20 may be formed under s 115 of the CA.
      - Maximum size depends on the profession involved:
        - Actuaries, medical practitioners or stockbrokers can form partnerships up to 50; architects, chemists or veterinary surgeons up to 100; legal practitioners up to 400; accountants up to 1000.
  - Relationships of partners to persons outside the firm:
    - Law of agency:
      - The acts of the agent are those of the principal.
        - Apparent or ostensible authority to act on the principal's behalf.
      - Third party (outsider) need only know that the person standing before them is acting as an agent of another – the principal.
    - Power of a partner to bind a firm:
      - Each partner is both an agent and a principal of every other partner of the firm: mutual or reciprocal agency.<sup>7</sup>
      - The actions of every partner who does anything for carrying on, in the usual way, business of the kind conducted by the firm, will bind the firm and the other partners.<sup>8</sup>
    - Liability of partners to persons outside the firm:
      - *Mercantile Credit v Garrod* [1962] All ER
        - Facts: One partner sold a car to a third party: without the authority of the other partner, contrary to the partnership deed, did not own the car.

<sup>6</sup> PA s 2(1)(c).

<sup>7</sup> Partnership Act 1891 (SA) s 5(1).

<sup>8</sup> PA s 5(1).

- Issue: Whether the act of selling the car was in the course of carrying on business in the usual way and if the innocent partner would be liable for the act of the fraudulent partner.
- Held: Selling cars was in the ordinary business of the garage and the innocent partner was therefore liable.
- Exception to the rule:
  - Depends upon whether the agent partner lacked the authority to act for the firm in the particular matter, and that the third party with whom that agent partner dealt wither knew that or did not know or believe them to be a partner.
- The extent of the partners' liability to persons outside the firm:
  - Liability will vary – tort differs from contract – depends on facts.
    - Contract:
      - All partners liable jointly.<sup>9</sup>
      - Joint liability: partners must be sued jointly and not individually.
      - If an action is brought against one, or only some, but not all of the partners who are jointly liable, and a judgment is entered by the court against the one partner, or some of them, no further action can be brought against the other partners, even if the judgment has not been fully satisfied.
    - Tort and Crime:
      - Liability joint and several.<sup>10</sup>
      - Partners remain individually liable as well.
      - Third party can sue each party individually to recover the loss.
- 'Holding out': the liability by estoppel of apparent partners of a firm:
  - Any person held out to the world as a partner may be liable, even though they have not been formally admitted to the partnership.
    - It does not matter whether or not the representation has or has not been made or communicated to the third party who gives credit to the firm by or with the knowledge of the apparent partner making the representation or allowing it to be made.<sup>11</sup>
    - *Tower Cabinet v Ingram* [1947] KB:
      - Facts: Former partner continued to use the letterhead of an old partnership after it had dissolved. Placed an order for goods using that letterhead in direct contravention of the dissolution agreement and without the consent of the ex-partner. Former partner then failed to pay for the goods ordered and the supplier sued, claiming that the ex-partner was also liable.
      - Issue: Whether the ex-partner was estopped from denying liability.
      - Held: The innocent ex-partner was not liable, because he had not 'knowingly' allowed himself to be represented as a partner.
- Liabilities of income and outgoing partners:
  - Only liable while a member of the partnership.
    - Not liable for anything that occurred prior to joining the partnership.<sup>12</sup>

---

<sup>9</sup> PA s 9(1).

<sup>10</sup> PA ss 10(1), 12(1).

<sup>11</sup> PA s 14(1).

<sup>12</sup> PA s 17(1).

- A partner that retires from the partnership does not cease to be liable for debts incurred before the retirement.<sup>13</sup>
  - Normally liable for anything which occurred during the partners' time in the partnership, even if the liability does not come to light until much later. However, this can be varied by agreement.<sup>14</sup>
- Should serve a notice upon retirement to existing partners and clients, and a further notice in the *Government Gazette*.<sup>15</sup>

### Relationship Between Parties

- The fiduciary duty of utmost good faith:
  - Each partner is a fiduciary of the other partners.
- 'Model' set of rules governing the relationship between partners:
  - PA provides a model set of rules governing the internal relations of the firm which apply when the partners do not have a written partnership agreement.<sup>16</sup>
- Variation of the partnership's rules by consent of the partners:
  - Consent may be express or inferred from a course of dealing.<sup>17</sup>
    - *Public Trustee v Schultz* (1964) CLR:
      - Facts: Partnership agreement called for an annual account of the assets and liabilities to be considered final and conclusive evidence of all the matters it contained.
        - In fact, the partners never complied with this provision.
      - Issue: Whether the partners had varied this clause of the partnership agreement by their course of dealing.
      - Held: Partners could vary the clause since it was a long-established precedent that a course of dealing by partners could vary the agreement between them
        - Evidence of a course of dealing such as in this case was sufficient to vary the partnership agreement's requirements, in respect of account preparation to reflect the new situation.
  - Duty of partners to render accounts:
    - Partners must render true accounts and full information of all things affecting the partnership to any partner or their legal representative.<sup>18</sup>
    - *Law v Law* [1905] Ch:
      - Facts: More active partner offered to buy out his sleeping partner, but failed to inform the sleeping partner of all of the assets of the firm.
        - Sleeping partner therefore accepted less than a proper value for his share of the partnership.
      - Issue: Whether the more active partner had failed to fully inform his sleeping partner.
      - Held: The court found for the sleeping partner, agreeing there had been a breach of the active partner's duty of disclosure.
  - Accountability of partners for private profits:

---

<sup>13</sup> PA s 17(3).

<sup>14</sup> PA s 17(5).

<sup>15</sup> PA s 36(2).

<sup>16</sup> PA s 24.

<sup>17</sup> PA s 19.

<sup>18</sup> PA s 28(1).

- Must account to the partnership for any private profit or advantage made without the consent of the other partners.<sup>19</sup>
- Does not apply to completely independent or private transactions of a partner.
- Duty of partner not to compete with firm:
  - If a partner, without the consent of the other partners, carries on any business of the same nature that competes with the firm, the partner must account for and pay over to the firm all profits made by that partner in their competing business.<sup>20</sup>

### Dissolution of Partnership

- Expiration of a fixed term.<sup>21</sup>
- Termination after a single adventure or undertaking.<sup>22</sup>
- Any partner giving notice.<sup>23</sup>
- Insolvency or death.<sup>24</sup>
  - Need a minimum of two partners alive.
- Bankruptcy of a partner.<sup>25</sup>
- Charging of partnership property for a partner's personal debt:
  - Where a partner has used partnership property as security for a personal debt, the other partners have the option of dissolving the partnership or not.<sup>26</sup>
- Illegality of a partnership:
  - Dissolved in every case by the happening of any event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership.<sup>27</sup>
- Court order.<sup>28</sup>
  - Not granted lightly – *Jenkins and Joaquim v Bennet* [1965] WAR:
    - Facts: 1 of 3 partners' wife set up a business in direct competition with the business of the partnership. Other two attempted to dissolve the partnership on the grounds that the third partner had a conflict of interest (prejudicial to the partnership, breached the partnership and that it was just and equitable for the partnership to be wound up.
    - Issue: Whether a partner's conflict of interest was sufficient grounds to warrant an order for dissolution.
    - Held: Partner's position indeed open to criticism but decided that the situation did not warrant dissolution of the partnership under any of the grounds pleaded.
      - Unsuccessful.
  - Application by a partner to the court for dissolution of a partnership will usually only be made where there has been an irretrievable breakdown in the lines of communication between the partners, or in the business itself.

---

<sup>19</sup> PA s 29(1).

<sup>20</sup> PA s 30(1).

<sup>21</sup> PA s 32(a).

<sup>22</sup> PA s 32(b).

<sup>23</sup> PA ss 26(1) and 32(c)

<sup>24</sup> PA s 32.

<sup>25</sup> PA s 33(1).

<sup>26</sup> PA s 33(2).

<sup>27</sup> PA s 34.

<sup>28</sup> PA s 35(a)-(f).

## Consequences of Dissolution of Partnership

- Liquidation of partnership property and payment of partnership debts:
  - Debts paid with firms' assets before partners.<sup>29</sup>
  - Surplus divided between partners according to how they shared the profits of the firm.
  - *Harvey v Harvey* (1970) CLR:
    - Facts: 'For of Partnership' would split expenses and profits evenly – no formal agreement was ever made. HH was dormant partner visiting farming land from time to time but taking no management role. HH and HLH signed an agreement as a tax minimization ploy that there was never a partnership. HLH died and his firm continued to run the farm. HH eventually gave notice to terminate the partnership with HLH's firm.
    - Issue: Whether the farm enterprise constituted partnership property to be divided equally between HH and HLH's firm, or whether HLH's firm had no interest in the farm as it was never partnership property.
    - Held: No partnership property and the improvements should not be brought into partnership account – instead, HH should pay the total cost of improvements.
      - More recent decisions have followed the minority reasoning of Barwick CJ:
        - Partnership rested on improving the farm in order to make a profit and not to give HLH's firm the benefit of the improved farm offended the fiduciary relationship HH had with the firm.
  - Debts are paid: out of profits, then capital, then personally by partners (in proportion to which they were entitled to share profits).
- Notices should be given to third parties:
  - Express notice given to existing clients can help protect against being held liable by estoppel in the future for the reconstituted firm's debts if the client does not know that the firm has been reshuffled (reconstituted).
    - Notice in the public notices section of the local newspaper will also serve as advice to any new clients and help shield outgoing partners against future liability for any debts of the reconstituted firm.
    - Failure to notify of dissolution or change in partnership could lead to continuing liability as a partner by estoppel.
- Authority of partners after dissolution of a partnership:
  - Partners' authority to bind the now non-existent firm only extends to complete transactions begun but not completed at the time of the dissolution, not to generate new business.<sup>30</sup>

## Limited Partnerships

- Limited liability of some members:
  - Limited partners may limit their liability to a fixed amount: 'limited partner'.
    - Concession is that this partner's power is restricted compared to general partners.
    - Need to have LP at the end of the firms' name.
- Composition:
  - At least one general partner and at least one limited partner.<sup>31</sup>
- Size:
  - Must always have at least one general partner – cannot exceed 20 otherwise it has to become an outsized partnership under s 115(2) of the CA.

---

<sup>29</sup> PA s 39.

<sup>30</sup> PA s 38(1).

<sup>31</sup> PA s 49(1)(a), (1)(b).

- Management:
  - A limited partner must not take part in the management of the business of the limited partnership and does not have power to bind the limited partnership.<sup>32</sup>
- Dissolution of limited partnerships:
  - Limited partner not entitled to dissolve the limited partnership by notice, separate debt, death, insolvency or retirement.<sup>33</sup>
  - Bars to dissolution are subject to the terms of any written limited partnership agreement.<sup>34</sup>
- Cessation of limited partnerships:
  - If no partners are limited partners, or they agree they will continue the partnership as otherwise.<sup>35</sup>
  - Notice must be given.<sup>36</sup>

### *Advantages and Disadvantages of Partnerships*

- Advantages:
  - Formation:
    - Relatively informal and inexpensive to establish and maintain.
  - Decision making flexibility:
    - Majority decision
    - No change may be made to alter the nature of the partnership business without the consent of all existing partners.
  - Management:
    - Each partner may have different areas of expertise – improves decision making; bounce ideas off each other.
    - Holiday leave and sickness can be accommodated more easily.
  - Privacy:
    - From public scrutiny – no reporting.
  - Profits and taxes:
    - No income tax (although return must be lodged).
    - Taxed individually – may have income splitting advantages.
- Disadvantages:
  - Unlimited liability of partners:
    - Private assets of partners at risk.
  - Joint and several liability:
    - Each partner is bound by the actions of their co-partners acting in the course of the business of the firm.
  - Lack of permanence:
    - Death or resignation interrupts the business – ends it if there is no partnership agreement – even if there is an agreement, it may interrupt business while it is rewritten.
  - Size:
    - Limited, which limits the expertise available, capital base.
    - Exception is incorporated partnerships (s 115 CA).
  - Capital:
    - Limited largely to the savings of individual partners.

---

<sup>32</sup> PA s 65(1).

<sup>33</sup> PA s 68(1)(a)-(c).

<sup>34</sup> PA s 68(1).

<sup>35</sup> PA s 69(1)(c).

<sup>36</sup> PA s 70.

## Joint Ventures

- A joint venture is an association of persons or different business structures that combine to undertake a one off project whose aim is to produce a product or output which will be shared amongst those co-venturers.
  - Useful way to combine the talents, expertise and assets of different parties.
- No statute law directed at a joint venture.
  - Depends on the parties involved (partnerships, sole traders, etc).
- Joint venture v Partnerships:
  - JV are one off projects; no agreement to continue business in common, repeatedly performing the same transaction or service with a view to sharing the profit.
  - Low degree of fiduciary trust and mutual obligation.
  - JV: Each participant deals with the other party at arm's length.
  - JV not responsible for the liabilities of the other party.
  - JV can sell their share of the JB to a third party without causing dissolution of that project or undertaking.
  - *Canny Gabriel (1974) CLR*:
    - Facts: Promotions company (PC) had contracts with entertainers (E) to do a one-off concert tour of Australia. Tour financed by PC borrowing funds from VS. PC agreed to assign a one-half interest in the E contract as a Joint Venture. Canny Gabriel provided further finance for the tour but held PC's claim on the box office receipts as security, unaware of the previous arrangements.
      - There would not be enough receipts to satisfy both parties with claims to the receipts.
    - Issue: Who should receive payment from the box office receipts first?
      - CG pursuant with its contract with VS; or VS with its contract with PC?
      - Depends on whether there is a partnership or not:
        - If VS a partner – it would have priority over CG.
        - If a JV, then no priority.
      - Held: Partnership – all elements of a partnership were satisfied, since the parties had joined in a business in common with a view to a profit. This was sufficient to create a partnership.
        - VS was first in line – priority over CG.
    - *United Dominions v Brian (1985) ALJR*:
      - Facts: JV for a land development project involving the construction of a shopping center. Dispute ensued when one failed to pay the other any of the substantial profits the venture produced.
      - Issue: Whether the relationship was a JV or partnership
      - Held: Partners despite the parties' style as a JV. Profits shared, policies agreed to mutually – indicated a partnership.
        - Therefore owed each other FD.

## Advantages and Disadvantages of a JV

- Advantages:
  - Simple to establish: contractual in nature – can arrange the relationship as they please.
  - Privacy: disclosure is whatever is necessary for the project at hand.
  - Lack of regulation: no special legislation or regulation.
  - No mutuality of agency: Not liable for the actions of other party.
  - Collective bargaining power: different assets available to each party (land, equipment etc).

- Separate shares of the outcome: not necessarily equal shares.
- Competition between co-venturers: arm's length dealings.
- Disadvantages:
  - No separate legal entity.
  - No FD.
  - Higher level of risks: inadequate levels of control when dealing with other parties; documentation or coordination of the different stages, resulting in waste and delays. May also be deemed a partnership by the court.
  - Lack of performance: No perpetual succession, making it difficult to prove that their co-venturers owed them any sort of continuing obligation once the project has ended.

## **Syndicates**

- A combination of persons who have become associated for the purpose of promoting some business enterprise or scheme.
  - May acquire the copyright to literary material and publish it simultaneously in a number of periodicals or newspapers.
  - No specific applicable law.

### *Distinguishing a syndicate from a partnership and JV*

- No mutuality of interest amongst the syndicate members – no familiarity between members.

### *Advantages and Disadvantages*

- Advantages:
  - Ease of formation: need only to agree to the terms of the syndicate contract.
  - Privacy: need not reveal anything but that which is required under the terms of the syndicate agreement.
  - Profit motive: aim of syndicate is to make a profit
  - Unrestricted competition: outside of the syndicate, members can compete with each other.
- Disadvantages:
  - No separate legal entity.
  - No FD.
  - Lack of permanence – not a long lasting business structure.

## **Associations**

- Any group of two or more like-minded individuals who come together of their own free will for a common purpose, whether for profit or not.

### *Unincorporated Associations*

- No separate legal identity standing between them and the assets of the group as they have not incorporated.
  - Members are fully liable for the debts of the UA.<sup>37</sup>

### *Incorporated Associations*

- Separate legal entity, liability limited to the amount of any unpaid annual membership fee.

---

<sup>37</sup> *Wise v Perpetual Trustee* [1903] AC



## ***For Profit and Not-For-Profit (NFP) Associations***

### *For Profit Associations*

- May include partnerships (UA) and companies (IA). Company is a separate legal entity whereas a partnership is not.

### *NFP Associations*

- Include unincorporated groups.

## ***Key Features of Un/Incorporated Associations***

- Unincorporated associations:
  - Not recognised by the law as a separate entity
  - Formed by the mutual agreement of members
  - Consists of nothing more than the aggregate of all its members at a particular time.
- Incorporated associations:
  - Separate legal entity
  - Limited liability possible.

# SEMINAR 1 (WEEK 2) CORPORATE LAW

## Question 2

### Client 1

Prima facie, it appears a **partnership** would be the most suitable form of organisation to establish for Samira and Kane. A **joint venture** may also be considered. This would be a relationship that subsists between Samira and Kane carrying on a business (selling Corporate Law notes) with a view of profit. A company would not be suitable considering the substantial costs and regulatory burdens associated with such a formation when considering the students only have \$250 start up capital. A joint venture or syndicate would not address Kane's liability concerns.

1. Cost
  - a. Relatively informal and inexpensive to establish and maintain the business.
  - b. Need a business name unless personal names are used.
2. regulatory burden
  - a. There is no small regulatory burden apart from the income tax return which must be lodged.
  - b. A partnership agreement may be desired lest the *Partnership Act* be used instead.
3. Tax
  - a. No income tax on the business – partners are taxed individually.
4. Liability
  - a. Generally unlimited liability, joint and several. However, Kane may wish to undertake a limited partnership role to ease his concerns. As long as Samira remains a general partner, this form is permitted.<sup>38</sup>
    - i. Kane can limit his liability to a fixed amount. Concession is that this partner's power is restricted compared to general partners.
    - ii. A limited partner must not take part in the management of the business of the limited partnership and does not have power to bind the limited partnership.
    - iii. Bars to dissolution are subject to the terms of any written limited partnership agreement.
    - iv. Must have LP at the end of the firms' name.
5. longevity of business
  - a. Dissolves upon death, incapacity, resignation or insolvency of partners unless provided otherwise in partnership agreement.
  - b. Even with a partnership agreements, such events may still interrupt business.
6. desire to sell, raise capital or exercise control
  - a. Sell: difficult to sell – limited to assets of the business.

---

<sup>38</sup> PA s 49(1)(a), (1)(b).

- b. Raise Capital: Capital is limited largely to the savings and assets of individual partners.
  - c. Exercise control: Decision making is made by majority decision and no change may be made to alter the nature of the partnership without the consent of all existing partners.
7. nature of the business
- a. This would be a relationship that subsists between Samira and Kane carrying on a business (selling Corporate Law notes) with a view of profit.
  - b. Agency and fiduciary duties between partners exists.
8. number of persons involved
- a. There are two people involved.

## Client 2

It is recommended that Henderson establish a company to protect himself with limited liability and grant easier access to capital markets. However, a proprietary company also enjoys limited liability and may be more appropriate if a public company is not desirable.

- 1. Cost
  - a. Need a business name unless personal names are used.
  - b. Regulatory compliance
  - c. Audits
- 2. regulatory burden
  - a. Per the Accounting Standards
  - b. Audits
- 3. Tax
  - a. Company tax rate of 30%
- 4. Liability
  - a. Limited liability. This will protect Henderson and Williams personally from large losses the assets of the business cannot meet.
- 5. longevity of business
  - a. Perpetual succession
- 6. desire to sell, raise capital or exercise control
  - a. Not attached to owners so easier to sell compared to other businesses.
  - b. Capital can be raised from the public
  - c. Control can be maintained through shares.
- 7. nature of the business
  - a. Business systems and software development.
- 8. number of persons involved

- a. 4 people (Henderson, Williams and two employees).

### Client 3

A syndicate in the form of a for profit association may be most apt as a combination of persons who have become associated for the purpose of promoting some business enterprise or scheme (mining 'explositron'), and some members have concerns about their liabilities.

1. Cost
  - a. Ease of formation: need only to agree to the terms of the syndicate contract.
2. regulatory burden
  - a. Privacy: need not reveal anything but that which is required under the terms of the syndicate agreement.
3. Tax
  - a. At individual level – no separate legal entity is established.
4. liability
  - a. Unlimited liability.
  - b. No mutuality of interest amongst the syndicate members – no familiarity between members.
5. longevity of business
  - a. Not a long lasting business structure – typically for the one scheme only.
6. desire to sell, raise capital or exercise control
  - a. Capital is raised through contributions of members.
  - b. Control:
  - c. Sell: difficult to sell – limited to assets of the business.
7. nature of the business
  - a. A combination of persons who have become associated for the purpose of promoting some business enterprise or scheme (mining 'explositron').
  - b. Used to spread risk.
8. number of persons involved
  - a. Unlimited.

### Client 4

Graham and Hannibal should go into a partnership, as all the hallmarks of a partnership exist (Profits shared equally, policies agreed to mutually),<sup>39</sup> so a joint venture probably would not be recognised by a court. A company may be too complex an organisation to establish for the purposes of a restaurant, but that option remains open based on liability concerns.

1. Cost
  - a. Relatively informal and inexpensive to establish and maintain the business.

---

<sup>39</sup> *United Dominions v Brian* (1985) ALJR

2. regulatory burden
  - a. There is no small regulatory burden apart from the income tax return which must be lodged.
  - b. A partnership agreement may be desired lest the *Partnership Act* be used instead.
3. Tax
  - a. No income tax on the business – partners are taxed individually.
4. Liability
  - a. Generally unlimited liability, joint and several. However, one partner may wish to undertake a limited partnership role to ease liability concerns. As long as the other remains a general partner, this form is permitted.<sup>40</sup>
    - i. Concession is that this partner's power is restricted compared to general partners.
    - ii. Must have LP at the end of the firms' name.
5. longevity of business
  - a. Dissolves upon death, incapacity, resignation or insolvency of partners unless provided otherwise in partnership agreement.
  - b. Even with a partnership agreements, such events may still interrupt business.
6. desire to sell, raise capital or exercise control
  - a. Sell: difficult to sell – limited to assets of the business.
  - b. Raise Capital: Capital is limited largely to the savings and assets of individual partners.
  - c. Exercise control: Decision making is made by majority decision and no change may be made to alter the nature of the partnership without the consent of all existing partners.
7. nature of the business
  - a. This would be a relationship that subsists between Graham and Hannibal carrying on a business (restaurant venture) with a view of profit.
  - b. Agency and fiduciary duties between partners exists.
8. number of persons involved
  - a. There are two people involved.

---

<sup>40</sup> PA s 49(1)(a), (1)(b).

### Question 3

On July 1 2013, Fred contracted to sell his farm to Peter for \$750,000. On July 15, before the contract was completed, Fred purported to sell the land to Argus Pty Ltd for \$500,000. Argus Pty Ltd was incorporated and registration completed on July 10 by Louise, Fred's partner. She is the director and sole shareholder. Argus Pty Ltd mortgaged the property to Esaxa Bank Ltd in order to borrow half of the purchase price. The balance of the purchase price is owed by the company to Fred. Advise Peter.

- The *Salomon* principle is departed from, and the corporate veil pierced, in only relatively rare situations to prevent the abuse of the corporate legal personality of a company where it is used as a façade or sham to evade the law or to frustrate its enforcement.
  - *Ascot v Harper* (1981) CLR:
    - Even if a company was not formed for the purpose of avoiding a legal obligation, it may lift the corporate veil if the company was a mere puppet of its controller.
  - The facts of this case are very similar to that of *Jones v Lipman*.
    - In that case, the D company was and at all material times had been under the complete control of the first defendant, and the acquisition of the defendant company by the defendant and the transfer to it of the real property comprised in the contract with the plaintiffs was carried through solely for the purpose of defeating the plaintiff's rights to specific performance and in order to leave them to claim such damages, if any, as they might establish.
    - However, in the current case, it is the partner of the defendant who has the complete control of the company.
  - In *Gilford Motor v Horne* [1933] Ch: The company was considered a 'mere cloak or sham' used as a device for enabling contractual obligations to be avoided resulting in an injunction being granted against the company even though the company was not a party to the contract with the plaintiff.
    - If the evidence admitted of the conclusion that what was being done was a mere cloak or sham and that in truth the business was being carried on for the defendant, the plaintiff should be granted relief accordingly.
- That Fred is not the sole and complete controller of the company may be an issue for Peter. However, being Louise's partner is a relevant factor.

*Jones v Lipman:*

- Facts:
  - L agreed to sell for \$5 250 to P certain freehold land which was registered with absolute title.
  - Pending completion, L sold and transferred the land to L's company for \$3000.
    - The company, which had a nominal capital of \$100, had been acquired by the D and he and a clerk employed by his solicitors were the only shareholders and directors.
    - The sale was financed by the borrowing by the company of \$1 563 from a bank whilst the rest of the purchase money remained owing to the D.
- Held:
  - L's company was the creature of the defendant, a mask to avoid recognition by the eye of equity, that a decree of specific performance could not be resisted since by his control of the limited company, in which the property was vested, he was in a position to cause the contract in question to be completed.
  - Justice Russell:
    - The D company was and at all material times had been under the complete control of the first defendant, and the acquisition of the defendant company by the defendant and the transfer to it of the real property comprised in the contract with the plaintiffs was carried through solely for the purpose of defeating the plaintiff's rights to specific performance and in order to leave them to claim such damages, if any, as they might establish.
    - In *Elliott and H. Elliott (Builders v Pierson)*, resistance to specific performance at the suit of a vendor was grounded on the fact that the property was vested in a limited company and not in the vendor.
      - The company, however, was wholly owned and controlled by the vendor, who could compel it to transfer the property, and on this ground the defence to the claim for specific performance failed.
    - **Specific performance cannot be resisted by a vendor who, by his absolute ownership and control of a limited company in which the property is vested, is in a position to cause the contract to be completed.**
  - *Gilford Motor v Horne:*
    - Facts:
      - D had entered into covenants restricting his trading activities, causing the defendant company in that case to be formed.
      - This company was under his control and did things which, if they had been done by him, would have been a breach of the covenants.
    - Held:
      - If the evidence admitted of the conclusion that what was being done was a mere cloak or sham and that in truth the business was being carried on for the defendant, the plaintiff should be granted relief accordingly.