

1. Introduction to a business organisation

1.1 Business structures

What is a business?

- Business requires process. Business is assets.
- Wholly distinct from how they are organised or structured.
- Business is process dealing with assets.

Company:

- A company is a way of organising assets and humans to conduct some form of business.

Business:

- Can be carried on by people usually requires some income generating assets. Assets are owned by someone.
- Assets are not synonymous with the owner

Organisations:

- At law differ from sociological and business categories, are not a single category at law.
- Are governed differently by distinct areas of law which sets out rights and duties

1.2 What do organisations do?

A group of people identifying themselves as such.

- Use a group name
- Varying levels of formality
- Membership (various methods of becoming a member, variable rights, carries unlimited liability)

Trusts:

- Trust law does not create an organisation per se allows one to organise one's affairs in a specific manner used under previous law regime to gain certain tax benefits

Business organisations:

- Are limited to the options provided by law must act within framework provided by law Company law focuses on law, not business

Which legal organisations?

- Factors include: liability structure, flexibility, level of formal organisation needed, tax implications, costs of establishment & maintenance

2. Partnerships

2.1 Overview

- A partnership is defined in the **Partnership Act 1958 (Vic)** s5 as 'the relation which subsists between persons carrying on a business in common with a view of profit'
- A partnership can properly be referred to as a 'firm' – s8
- There does not need to be a written agreement for a partnership to exist. As such, it may be that the total partnership contract between the parties will comprise some written, some verbal and some implied terms
- **The law does not recognize a partnership or firm as separate from its partners**
- The preliminary question is to determine whether a partnership actually exists – div 1
- If so, the law governs the relationship between the partnership and the outside world – div 2
- If there is no partnership agreement, or it is silent on a matter, the Act will augment the relationship – div 3
- As a partnership may be viewed as a legally binding contract between the parties, a minor who enters into a relationship may repudiate the relationship while under 18 years or within a reasonable time of attaining 18
- Should a partner become bankrupt, the partnership is dissolved – s37
- So as to avoid this, written partnership agreements contain a clause which stipulates that the bankrupt partner will automatically retire upon the declaration of bankruptcy but the other partners may continue on their business

2.2 Nature of Partnerships

- There are 3 elements to prove the existence of a partnership
- The absence of any element of the definition will mean that no partnership exists

1. The Carrying on of a Business:

- 'business' includes 'every trade occupation or profession' – s3
- Defining 'carrying on' becomes difficult and must be assessed using established case law
- *Smith v Anderson* (1880) 15 CH D 247, Brett LJ at 277-8
- 'the expression 'carrying on' implies a repetition of acts and excludes the case of an association for doing one particular act which is never to be repeated. That series of acts is to be a series of acts which constitute a business
- *Re Griffin; Ex parte Board of Trade* (1890) 60 LJQB 235, Lord Esher MR (Brett LJ) at 237
- 'whether one or two transactions make a business depends upon the circumstances of each case... if an isolated transaction, which if repeated would be a transaction in a business, is proved to have been undertaken with the intention that it should be the first of several transactions, that is with the intent of carrying on a business, then it is a first transaction in an existing business. The business exists from the time of the commencement of that transaction with the intent that it should be one of a series

2. In Common:

- The courts have established two tests of whether the 'in common' criterion is satisfied
- Firstly, is the person who is carrying on the business doing so as agent of all the purported partners? If a person is carrying on a business solely for themselves, a venture is not conducted 'in common' even though others may be involved
- *Lang v James Morrison* (1911) 13 CLR 1
- Secondly, are there mutual rights and obligations between the partners? The necessary mutuality arises if the parties have the power to enforce their rights against their associates, and are under legal duties to those associates
- Note the difference between a partnership and a trust – a trustee may carry on a business, the profits of which are shared amongst the beneficiaries – however the trustee is not the agent of the beneficiaries, nor is there mutuality of rights and obligations between them – the liability of the trustee to pay debts etc. is not incurred by the beneficiaries

3. With a View to Profit:

- An essential feature of a partnership and distinguishes it from non-profit clubs or associations
- Established if the object of the exercise is the acquisition of financial gain
- It does not matter if the venture is unsuccessful, so long as the requisite intention is present
- The definition of 'profit' is held to be that formulated in *Re Spanish Prospecting Co Ltd* [1911] 1 Ch 92, Fletcher Moulton LJ at 98-99
- 'profits implies a comparison between the state of a business at two specific dates usually separate by the interval of a year. The fundamental meaning is the amount of gain made by the business during the year.
- *Partnership Act* concept of profit is relatively narrow
- s6 also provides rules for determining the existence of a partnership.
- s6(1),(2) states the presumption that shared ownership of property, or the sharing of gross returns from property does not create a partnership
- s6(3) states that, subject to certain exemptions in paragraphs in (a)-(e), the receipt of a share of profits of a business is prima facie evidence that a person is a partner in the business
- These rules are not exhaustive.

2.2.1 Is there a partnership?

- Each of the elements of s5 must be present before there is a partnership, and established with some certainty
- Consider the rules under s6 and case law, but note that no one single factor is decisive
- The mere fact that the parties deny the existence of a partnership will not prevent a court from determining that one exists
- *Canny Gabriel Castle Jackson v Volume Sales* (1974) 131 CLR 321
- It is often a question as to whether an arrangement is a partnership or a joint venture
- *Television Broadcasters Ltd v Ashton Nominees Pty Ltd*
- If a partnership, the losses would be shared equally; if a joint venture, the losses were to be shared on the proportion that each of the parties has been required to supply or discharge during the course of the relationship

2.4 Relationships of partners

2.3.1 Liability

- For all debts and obligations incurred, s13 stipulates that *joint* liability of partners while they are alive, and *several* liability of the partner's estate after death
- A creditor must sue all partners together whilst alive, however can sue the living partners and the estate of deceased partner separately
- Joint and several liability during the partner's lifetime will arise where money or property has been misapplied or a partner has by any wrongful act or omission caused loss or injury – ss14–16
- Joint liability – borne by two or more persons together, so that all must sue or be sued
- Several liability – the parties can be sued separately and at different times
- A partner will not be liable for anything done before they became a partner – s21(1)
- A partner will not be liable for the debts and obligations incurred after retirement or death – s18(2), s21(2)

2.3.2 Power of a Partner to Bind the Firm

- The firm will be bound by the actions of the partners unless the person dealing with the partner knows that the partner has no authority or does not know or believe him to be a partner: s9
- **Court will consider the following factors:**
 - I. The kind of business carried on by the particular firm.
 - This is a question of fact.
 - II. The way in which the business is usually carried on.
 - In determining whether a partner's act was done for carrying on a business 'in the usual way', courts will look at the particular business and at other people's actions in similar businesses.

- Even if the act was within the scope of the business carried on by the firm, the partnership will not be bound if the act was unusual.
- Unusual business practices put the third party on notice that the partner may lack the requisite authority to bind the firm.

Case Study:

- *Goldberg v Jenkins* (1889) 15 CLR 31 p 7

Facts:

- Partner borrowed money with interest rate in excess of 60%

Held:

- Deemed not to be acting in 'the usual way' in relation to the firm's business
- The lender of the money could not recover from the other partners

III. The authority of the particular partner

- The principal will be liable when the agent acts with either *actual* or *apparent* authority
- Actual authority is given by the firm to a particular party and may be express or implied by the firm's conduct or the partner's position
- Apparent authority is what an objective outsider or third person would assume the partner is authorised to do.
- Regardless of whether the firm can be held liable, a partner will be bound in their personal capacity

IV. The knowledge and belief of the person with whom the partner is dealing

- If a person 'knows that the partner has no authority, or does not know or believe him to be a partner' that person cannot hope to bind the firm: s9
- Should a partner's powers be limited by agreement, the firm will remain bound by the partner's actions unless a third party has notice of the agreement: s12
- Should a transaction fall outside the requirements of s9, the firm will be bound if it ratifies the actions of the partner
- In some cases, the mere passing of time is enough to constitute ratification should there be no attempt to deny liability

2.3.3 Relationship between partners

- The law allows for partners to govern the relationship between themselves.
- This may be achieved via a written partnership agreement.
- Otherwise, the Act provides default provisions in Pt. 2 Div 3.
- The partners' rights and duties may be varied not only by a later written agreement but also by oral consent or by interference from the actions of the partners: s23.
- Where no partnership agreement, or it is silent on a particular matter, then recourse must be had to the Act.