

BUSINESS STRUCTURES

What are the Clients Goals?

1. What is the purpose of the proposed business?
2. Is the business existing and needs converting?
3. Does the individual have any goals/requirements?
4. Details about the business?
 - a. How many people involved?
 - b. How will the business be regulated?
 - i. Do they want duties/formalities etc?
 - ii. Ease of establishment?
 - iii. Management & control
 - c. Life span, Name, Risk/Liability

Sole Trader	A sole trader is an individual natural person who owns a business enterprise as principal.	<ul style="list-style-type: none"> • One Person • Sole trader provides capital • Management (control) • Easy establishment 	<ul style="list-style-type: none"> • No distinct 'body' of rules • Formalities and regulations that apply universally to all businesses, e.g. • Business Names Registration Act 2011 (Cth) (register business name if different) • Legal ramifications • Business is not a separate entity • Unlimited liability – could loose everything!! • Taxation is personal • Limited lifespan
Joint Venture	A joint venture is a contractual arrangement where separate business entities conduct a combined project or venture, sharing the resulting products, not as a business in common, but as independent operators in their own right.	<ul style="list-style-type: none"> • Parties own assets separately • No common sharing of resources • Conduct share of business independently • Very little mutuality • relationship between parties regulated by contract • joint venturers not necessarily agents for each other 	Distinguish from partnership <ul style="list-style-type: none"> • usually one-off project, rather than continuous • ability to sell share in enterprise to another • each venturer responsible for own debts, obligations, liabilities • very little common property • limited fiduciary obligations • not necessarily agents of each other
Association	An association is a body of two or more persons who form a social or cultural organisation that does not share any profits among its members.	Unincorporated association <ul style="list-style-type: none"> • typically clubs or societies • not subject to any specific legislation • not there to make profit / don't need to register • no legal personality • uncertainty about who will be liable for debts and liabilities 	Incorporated association <ul style="list-style-type: none"> • incorporated under relevant state legislation: • separate legal entity • limited liability • abbreviation 'Inc' following its name
Trading Trust	A trading trust involves the assets of a business being put into a trust, which is then used to operate the business.	<ul style="list-style-type: none"> • Similar to trusts in general. 	<ul style="list-style-type: none"> • Trustee Act 1936 (SA) • Corporations Act 2001 (Cth) • equity • common law • trust documents
Franchise	A franchise is a commercial agreement under which an individual entity buys the right to sell or distribute goods and services that have been developed, and registered, by the owner or inventor of the original idea.	<ul style="list-style-type: none"> • not a legal entity – an agreement • franchisor and franchisee could be any number of entities 	<ul style="list-style-type: none"> • law of agency • Franchising Code of Conduct • franchise agreement • general principles of contract law and agency law • depending on agreement
Cooperative	a collective of separate individuals who join together in a trading enterprise in order to provide their members with particular benefits, rather than just dividends.	<ul style="list-style-type: none"> • limited liability • members own shares • directors manage business • more extensive regulation 	<ul style="list-style-type: none"> • Australian Uniform Co-operative Laws Agreement • Co-operatives National Law Act 2013 (SA)

PARTNERSHIP

1. Definition

A partnership is the relation that subsisted between persons carrying on a business in common with a view of a profit.

- a. *Partnership Act 1891 (SA) s 1(1)*:
 - i. Carrying on a business
 - ii. In common
 - iii. With a view to profit

Contrasting with a joint venture

United Dominions Corp Ltd v Brian Pty Ltd – Joint venture is completely different relationship that is contractual in nature, arm's length, one off venture, not working together in a close fiduciary relationship with a particular purpose.

Carrying on a Business

- *Griffen; ex parte Board of trade*
 - If it is the first transaction – whether it is regarded as a partnership or a joint venture depends on whether it was – ‘business requirement’ imply an ongoing relationship – if an isolated transaction that has been undertaken with the intention that it be the first of many – that’s an intention to carry on a business and that will fit the partnership definition.
- *Ferguson v Federal Commissioner of Taxation*
 - Dealing with breeding cattle with view of a profit to buy a farm. Question existed if this was a business for the purpose of claiming a tax deduction where the two involved managed/were in charge of operations as they saw fit, court regarded as a partnership.
- *Gouberg v Herniman Associates*
 - 2 people were exploring the idea of starting a franchise hotel talking to experts such as architects. The scheme fell apart and one party had given instructions to architects who sought to claim payment.
 - The court found they were not yet a business as no business has been conducted and they were merely exploring possibility so not a partnership.
- *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales*
 - This case balanced the weight that should be attributed to what the entity calls themselves which was joint ventures over a single project of a concert tour. However, their actions suggested a partnership, so the court held irrespective of what they called themselves their actions fit a partnership.

In Common

- Ensuring mutual rights and obligations
- *Re Ruddock*
 - Business was conducted by R in own name who owed money to B. They came to an agreement that she would give certain portions in return as part of the agreement but she would not be held out as a partner. However, actions showed otherwise re permission/sharing profits. Business unsuccessful and B sought her money as a creditor, court said she was a partner and therefore could not be a creditor.

- *Checker taxicab v Stone*
 - S drove a taxi S owned and had to pay a hire fee each day. During the day had complete control but return at night in good condition and also pay part of earnings to S. Driver was negligent and question arose as to whether the owner of the taxi would be Vicariously Liable as a partner liable for a wrong committed in course of business.
 - Held that these businesses were separate and the payment of money was not enough to suggest mutuality (merely a contractual relationship).
- *Degiorgio v Dunn*
 - ACDC tribute band, run as a partnership which ended, one musicians, drummer, started a new business under similar name. Guitarist tried to claim he was a partner in that business.
 - Court held: G didn't want to be part of the partnership at the start, only agreed to be paid for the concerts (performance fee). No risk – not a partnership relationship – no 'in common'. Court also pointed out that had he been a partner he had 'competed' with the partnership which would have breached his fiduciary obligations.

With a View of a Profit

- Cases where people have set up companies to avoid tax – by intending to run a loss.

2. Characteristics

- At least 1 person but less than 20
- If more than 20 must be registered with the exception of professionals stated in *Corporations Act 2001* s 115: e.g. Lawyers, accountants etc.
- Capital from partners or bank
- Management by partners or partnership agreement
- Easy to establish: comes into existence by contract between/agreement
- The action of 1 partner is binding on the firm.

3. Advantages

- Favourable in small scale businesses
- Easy/cheap to set up
- Flexibility in carrying out business (e.g., name changes all partners must agree)
- Allow the pooling of financial resources as you might not have enough capital on your own
- Allow avoidance of employee/er relationship

4. Negatives & Legal Ramifications

- Issue of liability: bankrupt creditors of the firm cannot obtain all their needings from the partnership – they will go after the individual's assets and estates.
- Partners have unlimited liability.
- Generally, a partnership is not a separate entity in law except in litigation purposes in reference to the 'firm'
- S 17 ingoing and outgoing partners: don't escape liability for things done while they were there – still responsible after you've left the partnership.

5. Determining whether a partnership exists:

- S 2 *Partnership act* Ownership of shared partnership property exclusively used for purposes of business s 20.
- Sharing of gross returns
- Receipt of a share of the profits

6. Types of partnerships

- Ordinary partnership
 - Full liability to extent of personal estate
- Limited liability partnership part 3 *Partnership act*
 - All benefits of a normal partnership as well as idea of limited liability
 - Is registered in terms of the *Partnership Act* and max of 20 partners
 - One partner must be unlimited
 - There may be silent or sleeping partners whose roles are merely as investors as opposed to participating in management of the business.
 - However, as soon as a limited partner starts behaving as a general partners, they lose that safety net.
- Incorporated limited partnerships
 - Very rare
 - High risk venture capital type business, e.g. 20 Million part 3 *Partnership Act*
 - Separate legal entities

7. Regulations

- State Partnership acts regulations
- ABN
- Register for tax purposes potentially

8. Relationship between partners

- Fiduciary Duties
 - Sources and rights (agreement + case law)
 - S 19 – variation of the acts rules by consent of partners in the partnership agreement.
 - Duty of the utmost good faith.
 - S 20(91) duty to render accounts
 - *Law v Law*
 - S 29 – account for private profits – must share with partnership if make profits from an expertise that comes from the partnership.
 - S 30 – duty not to compete with the firm

9. Relationship with outsiders

- Dealings by partners with non-partner's s 5
 - Partners are agents of the firm generally
 - Principle gives authority to act on behalf and form contracts
 - General principles of agency: When consent is exceeded depends on:
 - Business of the firm
 - In the usual way: s 5(a)
 - Take into account everyday business purposes, for example, outside business hours? Strange location?
 - Knowledge of third party: s 5(b)
 - Knowledge of partner's authority: s 8

- *Mercantile Credit Co Ltd v Garrod* – seller of second hand cars – one sold a car without authority, didn't have title to it. How was the customer to know he didn't have the authority? The partnership was liable.
- Dealings with partners and outsiders s 6(1) authorised to do so, s 6(2) intention to bind the firm.
- Legal Ramifications/ extent of Liability:
 - S 9: liable for debts and obligations (contract)
 - Hold whole firm liable or one individual.
 - S 10(2): the firm is liable for loss by any wrongful act or omission if
 - (a) was in the ordinary course of business
 - (b) with the partner's consent
 - (c) loss or injury caused and is liable to the same extent as the wrongdoer.
 - S 12 – may be joint and severally liable (under s 10)
 - S 11 – all liable for misapplication of money or property of third parties.
 - If a partner goes off and spends all the money of a client.
 - S 14 – Partnership by estoppel
 - Anyone who holds themselves out or allows themselves to be held out as a partner could be held liable as if they were a partner.
 - *Tower Cabinet Co Ltd v Ingram* – used old letterhead

10. Forming a Partnership

- Forming a general partnership is easy, more onerous for limited liability
- Normally formed by way of agreement into entrance:
 - This can be a verbal as opposed to writing
 - Or inferred from intention/conduct if you are behaving as a partner
- Register an ABN (ASIC website)
- You may wish to register for tax purposes
- If you are using any name other than the name of the partners must be registered with ASIC
- **Recommend setting up partnership agreement:** allow for tailor made flexibility, if there is an issue it is handled according to this agreement as opposed to the *Partnership Act* s 24(1)

11. Dissolving a Partnership

- Change in composition
 - If a partner leaves
 - If a partner joins
 - Term expires: don't need to form a new agreement
 - Single venture partnership: once venture completed partnership is dissolved.
- Bankruptcy