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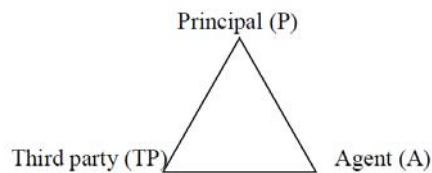
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Topic 1: Agency & Partnership Law

Agency – Reading 1.1



Agency is the legal relationship between a principle (P) & his agent (A)

- The law of agency governs the situations in which P will be bound by the acts of A

An agent is a person who is authorised (expressly or impliedly) to act for P so as to create or affect legal relations between P and TP: *Peterson v Moloney* (1951) 84 CLR 91 at 94

- P is bound in law by the acts of A as a result of (& generally only to the extent of) the authority given to A
- Whether a relationship of agency exists depends not on the terminology used by the parties but on the nature of the authority conferred

Agency is one form of 'employment' in the widest sense of that word, but it must be distinguished from other forms of employment, in particular

- the relationship between an independent contractor and his 'employer'
- the relationship between an employer and his employee (in the strict 'master and servant' sense of those terms)
- the relationship between a trustee and his *cestui que* trust or beneficiary

A relationship of agency may be found to exist even where there is an express contractual provision to the contrary: *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130; *Colbron v St Bees Island Pty Ltd* (1995) 56 FCR 303

- However where the category to which the relationship belongs is not clear, the parties are free to remove the ambiguity by express agreement
 - *AMP Society v Chaplin* (1978) 18 ALR 385 - the court ruled that a written agreement between a life assurance society and its representative constituted the parties principal and agent, not employer and employee (an express provision in the agreement said so - this was one factor which influenced the court in reaching its decision)

Creation of Agency – SG8 & P535

- ❖ Agency by actual authority (express)
- ❖ Agency by actual authority (implied)
- ❖ Agency by estoppel (apparent authority/ostensible authority)
- ❖ Agency by operation of law (necessity)
- ❖ Agency by Ratification

Agency by Actual Authority

'An actual authority is a legal relationship btw P & A created by a consensual agreement to which they alone are parties. It's scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business btw the parties': Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd (1964) 2 QB 480 per Diplock LJ at 502-3

NOTE:- There are some cases where A's appt must be under seal or must be in writing

Appointment under Seal

This is necessary if A is to be authorised to make contracts or execute other docs under seal

"Power of attorney" – appointments made under seal

- It may be limited in time or indefinite
- It may be revocable or irrevocable
- Sometimes the doc needs to be registered before an act can be valid (eg. Deal with land): **s29 Powers of Attorney Act 2003 (NSW); s132 Land Title Act 1994 (QLD)**

A company registered under the **Corporations Act** may appoint agents in the same way an individual does & need only make an appointment by deed where an individual would be required to confer authority in that way: **s126 Corporations Act 2001 (Cth)**

(Express Authority) Appointment in Writing

This is necessary in certain cases:-

- Land dealings disposing or creating an interest in land: **s23C Conveyancing Act 1919 (NSW); s11 Property Law Act 1974 (QLD)** etc
- Where **Statute of Frauds 1677 (UK)** applies writing will be req'd if the relationship is not to be performed within 12mths of formation (TAS only)
- The establishment of specific agencies may require writing under certain statutes
 - Eg. NSW – creation of non-commercial sub-agency arrangements must be established by agreements in writing: **s34 Property, Stock & Business Agents Act 2002 (NSW)**

(Implied) Actual Authority

Where an agency has been created by express (NOT implied) agreement btw P & A – A is said to have 'express actual authority' in relation to the subject matter of the agreement

A may have 'implied actual authority' in addition to the express actual authority because of the circumstances of the case & because of the need to give effect to the intention of the parties

So – A will not necessarily exceed his authority merely because he has done something outside the terms of his agreement with P

Courts are concerned with giving 'business efficacy' to commercial contracts

ANZ Bank Ltd v Ateliers de Constructions Electriques de Charleroi (1966) 39 ALJR 414 – Privy Council decided the agent could justifiably be taken by an outside such as the bank to have had implied authority from P to bank the cheques given the circumstances

- A was their sole agent in Australia
- There was a written agreement btw them
- A had negotiated a contract with TP & the contract price was payable in Australia in AUS currency

- Progress payments were made by chqs in favour of P c/- its agent which he indorsed into his own bank account
- P had no bank account in Australia (P537)

Agency by Estoppel AKA Apparent (Ostensible) Authority – SG9 & P542

'The apparent or ostensible authority rests upon a representation made by P that A has authority to enter into a contract of a kind within the scope of the apparent authority': Pegela Pty Ltd & Ors v National Mutual Life Association of Australasia Ltd (2006) VSC 507 per Redlich J at 492-3

Where the words or conduct of A leads TP to assume A is acting as P's agent, then P is estopped from denying that A is in fact acting as their agent

The inference or implication of agency raised binds P

P is bound by the ostensible/apparent authority of their agent whether or not it was their actual authority

A person employed for certain purposes is assumed to have all those powers normally attached to such a position (apparent authority)

Limitations imposed upon A by P must be made known to persons dealing with A

Tooth & Co v Laws (1888) 9 LR (NSW) 154

- Laws was a licensee of a hotel & had left his name over the door of an Inn @ Parramatta but was no longer involved in the business
- The hotel was now run by Mr & Mrs Kinchela
- Tooth & Co supplied \$300 worth of beer to the hotel & sued Laws when they were unable to obtain payment from Kinchela's
- It was held that it was a fair & reasonable inference from Law's conduct that the Kinchela's were his agents to buy & sell so Law was estopped from denying they did not have authority
- The court indicated that if notice had been given to Tooth & Co that the Kinchela's were not his agent then estoppel would not have been established

Watteau & Fenwick (1893) 1 QB 346

- A firm of brewer's owned a VIC hotel (P) & appointed Mr Humble (A) as mgr
- The licence was taken out in Humble's (A's) name & also appeared over the door
- The owners prohibited Humble from buying cigars but Humble purchased them from the Plaintiffs (TP) on credit
- When payment was not rec'd TP sued P upon discovering they were the real owners of the hotel
- It was held the owners were liable for all acts of their agent which were within their authority usually conferred upon an agent of his particular character, even though:-
 - He had never been held out by Ps as their agent
 - He had exceeded the authority given to him AND
 - TPs did not know of the Ps existence at the time of the contract

Topic 4: Pre-registration Activities & the Process of Registering a Company

Types of Companies – SG47 & TXT 5.707 5.143 & Activity 4.1

	Proprietary	Public
Shareholders	1 shareholder (max 50)	1 shareholder (no max)
Directors	1 director (1 resident)	3 directors (2 resident)
Finance	Cant get funds from public	Can get funds from public (with disclosure doc)
Listing	Cant be listed on ASX	Can be listed on ASX

Section 112(1) indicates that a company registered must be 1 of 6 available types:-

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

Companies incorporated under the *Corporations Act* are automatically entitled to carry on business in any Australian jurisdiction without any need to register in that jurisdiction – SG49

Limited Companies – SG47 & TXT170

The liability of a member is limited to the amount the member has agreed to invest in the company

This may be affected by:-

- (a) **Shares** – the obligation of the shareholder is limited to the nominal value of the shares held & the shareholder cannot be called upon to contribute more than this amount in satisfaction of the company's debts: s516
 - "Companies limited by shares" - TXT5.080
 - It must be formed with share capital
 - They can issue different classes of shares with differing rights (eg. non-voting shares)
- (b) **Guarantee** – a member undertakes to contribute a stated amount to the property of the company if it is wound up
 - "Companies limited by guarantee" – TXT5.090
 - The company is a limited company because a member's liability to contribute is limited to the amount of the guarantee
 - It does not have the power to issue shares: s124
 - Members have fractions of interest in the company so long as they are not related to contributions of share capital
 - It is prohibited from paying a dividend to its members: s254SA
 - If it is wound up without adequate funds to discharge its liabilities then each member is liable to pay an amount that the member has undertaken to contribute if the company is wound up (determined at commencement): s517

- If company can't meet its liabilities then past members within a year before commencement of winding up are liable to honour their guarantees & only toward debts incurred before they ceased to be members: **Pt 5.6 Div 2**
- The amount guaranteed is not an asset of the company that it can charge in order to secure a loan: *Re Irish Club Co (1906) WN 127*
- They cannot increase or reduce the amount of the guarantee by amendment or agreement with its members – this inflexibility makes them unsuitable for any venture whose capital needs are likely to change: *Hennessy v National Agricultural & Industrial Development Association (1947) IR 159*
- The reporting requirements differ according to the size of the company, measured by revenue
- A company limited by guarantee cannot be a proprietary company & will always be a public company

Unlimited Companies – **SG48** & **TXT 5.110**

The financial liability of members is not protected

- They can be called upon to contribute to the limit of their personal assets to satisfy debts of the company: **s112(1)**
- They can have share capital (doesn't need to)
- They can redeem its own shares
- They can be registered as a proprietary company or public company: **s112**
- Members are not directly liable to creditors of the company
 - It is contingent upon the company being wound up & assets of the company being inadequate to satisfy liabilities
 - A creditor must apply to the court for a winding up order to recover from members
 - Members will be called upon to contribute equally in first instance
- They are not usually used by trading ventures

No Liability Companies: **Corporations Act s122(2)** – **SG48**

A company can only be registered as a no liability company if its sole objects are for mining purposes: **s9**

- Essential feature – any unpaid amount of shares is not a debt enforced by the company & the shareholder has no liability to pay calls: **s254M(2)**
 - HOWEVER were a call is unpaid the shares must be forfeited: **s254Q**
- A shareholder has no liability for calls or contributions
 - BUT is not entitled to participate in a surplus on winding up on any non-forfeited share where a call is in arrears until the amount owing has been fully paid: **s254P(2)**
- Restrictions are placed on the timing of calls: **s254P**
- Shares with unpaid calls are automatically forfeited & must be offered for sale by public auction within 6wks from date the call is payable: **s254Q**
 - BUT the directors are entitled to fix a reserve price not exceeding amount of calls due & unpaid: **s254Q(7)**

- Proceeds of sale of forfeited shares is applied in payment of:-
 - Expenses of sale
 - Expenses incurred in respect of forfeiture
 - Calls due & unpaid
 - Any balance paid to the member whose shares sold if they deliver the share certificate to the company for those shares: s254Q(11)
- Any person whose shares have been forfeited may redeem the shares up to the day before date of sale by paying the amounts due re such shares, incl a proportion of the expenses of forfeiture: s254R
- Vendors & promoters cannot be given preference in a winding up: s254B(4)
- If the company ceases to carry on business within 12mths of at incorporation, shares issued to them for a consideration other than cash rank in winding up behind shares issued for cash: s254B(3) (The aim is to protect later investors against sales at an overvalue by fraudulent promoters)

Proprietary & Public Companies – sG49 & TXT 5.121

A public company is defined as being any other company other than a proprietary company: s9

- Directors cannot be removed by other directors: s203E
- Min # of directors is 3

Proprietary company:-

- Max 50 non-employee shareholders: s113(1)
- It must not engage in any activity that would require lodgement of a prospectus (eg. Inviting the public to subscribe for shares/debentures of the company or deposit money with the company): s113(3)
- They must use the word "proprietary" or PTY in the company name: ss148, 149
 - Eg. A Pty Ltd = proprietary company
 - Eg. B Ltd = public company
- Advantages:-
 - Min # of directors is 1: s201A
 - Directors can be removed by other directors if the power is expressed in their Constitution
 - No necessity for each director to be appointed by separate resolution: s201E
 - No statutory right of shareholders to remove a director: s203D (it may be in their constitution)
 - Certain exemptions apply re takeover provisions for companies with less than 50 members
 - Strict rules re the independence & qualifications of a liquidator do not apply in a members voluntary winding up: ss532(4), 532(1), 532(2)
 - Auditing requirements are reduced: s327
 - Rules on voting where there is a personal interest under 2D.1 are not as strict: ss194-5

Topic 8: Meetings

The Registered office – SG81

- A company is required to have a registered office in Australia: s142(1)
- The address of the registered office must be lodged with application to register the company: s117(2)(g)
- The office must be open to the public during prescribed hours: s145
- The importance of a registered office is so that service of notices and documents may be effected by delivery or post: s142(1)
- The name of the company must be displayed at every place of business that is open to the public: s144(1)
- A public company must prominently display the words 'Registered Office' at its registered office: s144(2)

Meetings & Proceedings – SG81 & TXT 7.300-7.315 & TXT 7.370-7.570 & Chapter 2G.1-2G.3

The overall control of company is exercised by the members of the company in general meeting but business of company is normally managed by the directors: s198A (rr)

The rules governing the conduct of meetings is usually provided in the Constitution & so long as they do not conflict with the provisions in the Act they will be followed

These provisions cannot be overridden by the Constitution unless they are in the form of (rr)

Meetings – TXT319

There are 2 types of meetings:-

- **Annual General Meeting** (for public companies): s250N & TXT322
 - An AGM must be held within 18mths of registration: s250N(1)
 - A public company must hold an AGM at least once in each calendar year & within 5 mths after the end of its financial year: s250N(2)
 - The company can apply to ASIC to extend this time: s250P(1)
 - A listed company must submit a director's remuneration report to a non-binding vote: s300A & s250SA
 - Company's auditor must attend: s250RA & s250T
 - The business of the AGM is covered by s250R
 - The company's annual financial reports, directors & auditors reports must be laid down before the AGM: s317
 - Auditors are appointed & dividends are declared
 - Questions (or comments) are allowed about management: s250S
 - Questioning of auditors is allowed: s250T
 - Sections 249C-250M apply to an AGM
 - If there is only 1 member of the public company then no AGM is required: s250N(4)
 - **Conduct at AGMs:** TXT350

- **General meeting** (meeting with members) – TXT329
 - A director can call a meeting of the company's members: s249C (rr)
 - Same for listed company: s249CA
 - Directors have the statutory power to **requisition** a general meeting if there is a specified # of members:- (TXT331 – for cases)
 - Members with at least 5% of votes that may be cast at a GM (s249D(1)(a)) or
 - At least 100 members entitled to vote at GM: s249D(1)(b)
 - Member's requests must be in writing stating the resolution they propose & be signed by the member & given to the company: s249D(2)(a)-(d) & TXT328
 - The directors must call the meeting within 21 days after the request is given to the company. The meeting is to be held not later than 2 months after the request is given to the company: s249D(5)
 - If directors fail to convene a meeting when requisitioned, the requisitionists can call a meeting under s249E (Constitution cant stop them)
 - Company must pay reasonable expenses incurred for members calling the meeting: s249E(4)
 - Company can recover such cost from the directors who failed to comply: s249E(5)
 - The Court can also order a meeting if it is impracticable to do it any other way: s249G & TXT330
 - PTY companies with 1+ members can avoid the need for a meeting if all members entitled to vote on a resolution signs a doc supporting the resolution: s249A(2)
 - This does not apply to a resolution removing an auditor: s249A(1)
 - **Voting at GMs:** TXT350
 - Can non-members be entitled to vote?
 - Limitations on power of a majority

Resolutions – TXT344

Special resolution = requires at least 75% of the votes cast by members entitled to vote

Ordinary resolution = requires a simple majority of votes cast by members entitled

- Resolution on remunerations – TXT324
- Member's rights to put resolutions & distribute statements – TXT328

Notice (SG82 & TXT299 & TXT339)

- General rule = at least 21 days notice is required for GM: s249H(1)
 - ..unless Constitution may specify a longer minimum time: s249H(1)
 - The procedure allowing shorter notice is followed under s249H(2)
- Listed Public company = 28 days notice is required (regardless of Constitution): s249HA
- Written notice must be given to members individually: s249J
 - Contents of notice prescribed under s249L
 - The notice must be clear, concise & in an effective manner: s249L(3)