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- ASIC, shareholders, members, directors' duties

WEEK TWO – ALTERNATIVE BUSINESS STRUCTURES

LECTURE – INTRODUCTION TO ACL AND ALTERNATIVE BUSINESS STRUCTURES

Introduction and Sole Traders

- Just because you choose one structure, doesn't mean that you can't change it later, and turn it into a company
- Factors for choosing a structure include:
  - Liability – how much personal liability do you want
  - Management and control – how much do you want to retain, or are you happy to hand over the reins
  - Capital – how will you make money
  - Profits – how to divide profits
  - Fees and costs – what are the set- up fees and ongoing costs

1. SOLE TRADER

ADVANTAGES	DISADVANTAGES
Easy to set up and operate	Unlimited liability
Individual TFN (tax file number) and Bank Account	No perpetual succession
Control – no sharing of profits	Income tax
Minimal formalities – only need to register business name	
No ongoing disclosure obligations	
Easy to change structure	
Financial privacy	

Trusts and Associations

- Trust property – can be tangible e.g. houses or cars; or intangible e.g. shares, investments, intellectual property
- Keeps the assets in the protection of someone who controls it – *the trustee looks after it on behalf of the beneficiary*
- ***Beneficiary –*** *the one who is entitled to the property of the trust – not the legal owner, but gets the property*
- ***Trust deed –*** *legally binding on the trustee, important to protect the trusts property & the beneficiary*
- Significant tax benefits to the trust – structure is very flexible, minimal or extensive rights and obligations
- ***Associations –*** *get together with similar interests e.g. charity, sports group etc.*
- ***Unincorporated association –*** *not a separate legal entity, very risky for committee members as they have unlimited personal liability*
- ***Incorporated association –*** *separate corporate identity, recommended structure for larger groups signing contracts and owning property, must be a not-for-profit, any profits can only be used to further the cause of the organisation, no personal profits*

2. TRUSTS

ADVANTAGES	DISADVANTAGES
Tax benefits	No perpetual succession – at some point the beneficiaries must receive their property
Financial privacy	Complex laws and regulations and formalities to be complied with – expensive to set up
Asset protection	No immediate access to property
Reducing asset levels for income thresholds	Clients unfamiliar with structure

3. ASSOCIATIONS

ADVANTAGES	DISADVANTAGES
Can be incorporated or unincorporated	Unable to generate profit for its members
Separate legal entity	Less flexible structure
Perpetual succession	Maintenance and expenses
Tax exemption	Financial and membership records
Operate a bank account, enter into contracts	

Partnerships and Joint Ventures

- Partnership is governed by its own act, outside of the Corps Act – *Partnership Act 1892 (NSW)*
    - "Partnership is the relation which exists between persons carrying on a business in common with a view of profit and includes an incorporate limited partnership" – Section 1

- "Carrying on" – usually not a one- off event, but there are exceptions depending on the relationship of the event & the facts – *the substance of the relationship*
- "In common" – activities must be in common
- "With a view to profit" – can't be for charity
- Section 2 – Partnership Act:
    - Joint tenancy, tenancy in common etc. **does not of itself** create a partnership
    - The sharing of gross returns **does not of itself** create a partnership
    - The Courts look at all these factors together
- Factors of a partnership
    - Co- ownership of property
    - Sharing of gross returns
    - Sharing of profits
- Five exceptions to a partnership (Section 2, Subsection 3)
    - The receipt by a person in debt does not make themselves a partner in the business
    - Contract for an employee that may share in profits is not a partner (wages)
    - A person being the widow, widower or child of a deceased partner who receives through annuity a portion of the profits, is not a partner and not liable
    - The advance through a loan where the lender receives a rate of interest that varies with profits is not reflective of a partnership
    - A person who receives through annuities a portion of the profits of a business through goodwill is not a partner
- Difference between a lender and a partner – ***Badeley v Consolidated Bank (1888)*** – *lenders are entitled to receive interest and profits, without making them partners*
    - ***Megevand, ex parte Delhasse (1878) –*** *explicitly said that they were not a partnership, but the courts didn't care about that, because there was more than just being a lender, they had control to inspect the books etc.*
- Partnership obligations:
    - Unlimited liability
    - Agency relationship (s5) – you are liable for your partner's decisions in the ordinary course of business
    - Joint liability for contracts (s9) – have to choose your partner carefully and trust them
    - Joint and several liability for tort (s10)
    - Joint and several liability for misapplication of money or property (s11)
    - Liability by holding out/ estoppel (s14) in the case of an apparent partner
    - Fiduciary relationship – common law principles (ss28-30)
- ***Fiduciary relationship –*** *each partner owes to the other the equitable duty of honesty, loyalty and good faith – legal obligation to the other person*

How to Answer a Partnership Problem Question

1. **Is there a partnership?**
2. **Section 1 PA - Go through 4 elements**
3. **Section 2 PA – What elements are satisfied? Are there any Exceptions to Partnership?**
4. **Distinguish between lender vs partner**
5. **Has there been a breach of the duties? ss 28-30**

- Partners must always act in the best interests of the partnership (and put partnerships interests ahead of personal interests)
- S28 – Partners have to make full disclosure to each other on all matters affecting the partnerships, the partner must not profit by completing with the firm
- S29 – Duty of partner to account for private profits – can't make secret profits – *allowable if disclosed*
- S30 – duty of partner not to compete with the firm – cannot do so without consent of other partners – *is it in the same course of business?*

Partnership

ADVANTAGES	DISADVANTAGES
Simple to form	Unlimited liability
Greater borrowing capacity	S 5 Agent – every partner can be bound by other partners actions
Income splitting	Statutory duties and fiduciary obligations
Financial privacy	No perpetual succession
Limited external regulation	
Easy to change legal structure	

5. JOINT VENTURES (JV) VS PARTNERSHIP

JOINT VENTURE	PARTNERSHIP
Specific duration or for a limited purpose ("one-off" project	Continuing and indefinite
Individual liability	Joint and unlimited liability
Freely dispose of their interest (property or share) in the joint venture	need to assign their interest and do not enjoy this general freedom
Parties in a JV are not necessarily in a fiduciary relationship	Partners owe fiduciary (and statutory) duties
The joint venture parties receive a share of the product	whereas partners share profits
Courts look to the substance not the label	**Courts look to the substance not the label**

Joint Venture

ADVANTAGES	DISADVANTAGES
Individual liability	Set up costs and formalities can be minimal or complex depending on commercial activity
Taxation (each party liable for own tax; unlike partnership, no joint tax return	No specific body of law on JV – governed by contract law and other laws that regulate the particular project
Accounting and tax treatment (for income and expenses; each party adopts their own	
Property (each party has its own share as tenants in common	
Control/management (by joint committee)	

SEMINAR NOTES

- ***Mutual liability –*** *each partner is both the principal and the agent of the other partners – unlimited personal liability for all of the debts of the partnership*
- A partnership requires continuity of trading
- "With a view of profit" – don't actually have to be in a profitable position, as long as the intention is to make a profit
- Corporation – artificial legal person separate from its owners
- Company – type of corporation, regulated by the Corporations Act
- Other types of corporations:
    - Company
    - Statutory corporation
    - Incorporated association
    - Body corporate
- Public companies have a lot more safeguards and disclosure requirements
    - Liability – how to safeguard your personal assets
- Sole trader – no perpetual succession
- Company – the only way that a company can die out is if you deregister the company and go through the actual process of closing it – it won't die out of its own accord
- Trusts – testamentary trust – if you die, all your property is left in trust to someone who holds it for your children
- Associations – need someone to make agreements/ contracts – personally liable (unincorporated associations)
- The courts don't care about the label you put on your relationship → they care about how the partnership acts

- Partners are principals and agents for each other → you cannot make secret profits in the ordinary course of business, and you cannot compete
- If you don't have a provision in the partnership agreement, the death of a partner dissolves the partnership

WEEK THREE – CHARACTERISTICS OF A COMPANY

LECTURE NOTES

- Issuing shares and debentures – ways for a company to raise money or capital → debt or equity financing
- ***Debt financing –*** *where a company raises finance from a loan – can be secured or unsecured*
    - ***Secured –*** *the company has made all or some of its assets available for payment of the loan, in case the company can't make repayments- lender seizes the assets*
    - ***Unsecured –*** *not secured by physical assets, only be credit worthiness of the issuer*
- ***Debentures –*** *legal right where a company undertakes to repay as a debt, money that is deposited or lent to the company (s9)*
    - People who hold debentures are creditors – contribute to the capital of the company, but have no right to the company – just get the right of payment of principal and interest
- ***Equity financing –*** *share capital that investors have provided in exchange for shares in the company*
    - Can issue different classes of shares with different rights attached to them
    - Shareholders are members of the company, don't have to pay back principal and interest
    - Right of distribution – right to receive dividends
    - Right of control over management – can effectively sack managers

Equity vs Debt

SHARE CAPITAL (Shareholder)	DEBT CAPITAL HOLDER (Debenture holder)
Member – Voting/Control Rights	Not a member, no right to dividends
Share capital is supplied to the company to be used for the company's business	Right to repayment of principal plus interest at agreed rates in accordance with loan agreement
Shareholders will only receive a divided if the company makes a profit	Company is obliged to pay interest regardless of whether it makes profit
	Loan capital is for a short term

- *"A company validly incorporated without fraud, is a separate legal entity from its members" ~ Salomon v Salomon (1896)*
    - A company comes into existence through registration – separate legal entity
    - Has all the rights of a natural human being – sued and be sued, the company is separate from the individuals – protection of directors and shareholders
- ***"Corporate veil" –*** *the Company has its own legal existence and therefore rights and duties are completely separate and distinct from the people involved in it e.g. directors, members/ owners, employees and agents*
    - Imaginary veil that keeps the people from the company from being tried for their actions
- Section 124 – Golden section of company law
    - Once a company is legally incorporated, it has all the legal capacity and powers as a natural human being – *e.g. can buy and sell property, sue and be sued, enter into contracts*
- Ask in what capacity is the person acting in at that time – *what duties are they fulfilling*
    - A company can enter into a contract with its individual members
- If a company is set up to break the law, or avoid a legal obligation, the corporate veil is lifted, and the separate legal personality of a company will be ignored, and the members will be personally liable
- There is a difference between property that belongs to the company which members don't have rights in, and individual property