

Sole Traders, Partnerships & Law of Agency

Forms of Business Organisation

- When people start up a business they are faced with a choice: in what form do they want their business to be structured and administered? They can choose: sole trade, partnership, company, trading trust, unincorporated associated, joint venture, co-operative, etc.
 - A *joint venture* is where separate business entities conduct a combined project or venture and share the resulting product
 - *Trust*: settlor → trust property → trustee(s) (legal title holder of trust property) → beneficiary (equitable owner of trust property)
- Relevant factors that have to be considered when making this decision include: *taxation* (sole trader and partnerships are taxed at the owners individual marginal tax rate; companies at 30%), unlimited/limited liability, access to capital, managerial control, business objectives, expenses, rigidity of structure, professional or industry requirements, set-up and compliance costs, business name and ABN registration, obligations under legislation, etc.
- Forms without a separate legal entity: sole trader, ordinary partnership, joint venture, etc.
Forms with a separate legal entity: incorporated limited partnerships, trusts, corporations, etc.
- External regulation of businesses by the commonwealth government (ATO, ACCC, ASIC, APRA, AASB, etc), state government (Department of Fair Trading NSW), and non-government (ASX).

Sole Trader

- A **sole trader** is an individual natural person who owns his/her own business.
- There are very few procedures or requirements for the sole trader to follow in order for them to establish their business. They still, however, need to be aware of relevant legislation depending upon the industry in which they operate.
 - They may still need to register a business name and obtain a license (e.g. for real estate agents, travel agents, etc).
- The Australian Securities and Investments Commission (ASIC) is responsible for registering, renewing and administering business names under the *Business Names Registration Act 2011*.
 - If a person wants to conduct business under a business name, they will generally need to register that name by lodging an online application with ASIC (must have an ABN first, or be in the process of applying for one, or also applying for one at the same time).
 - Generally, you must:
 - Register a business name if not using your own name: s 18;
 - Must include the registered business name on business correspondence and paperwork: s 19
 - Must display your business name at places open to public: s 20.
- Sole traders have *unlimited liability*, meaning creditors will have recourse against all assets owned by the sole trader – whether they are used in the business or not.
 - This means that assets of a private nature may be used to satisfy the sole trader's debts.
 - Insurance policies exist to protect a sole trader, such as public liability insurance.
- The death of the sole trader will generally mean the *cessation* of the business. Alternatively, a sole trader may wish to close the business down.
- Advantages: not expected to file financial accounts with ASIC, have control to make own decisions, etc. Disadvantages: capital is limited to profit & trader savings, unlimited liability, etc.

The Law of Agency

- **Agency** is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act.
 - The one on whose behalf the act(s) are to be done is called the *principal*. The one who is to act is called the *agent*. Any other person is a *third party*. For example, the board of directors are the agent for shareholders, who are the principal, because they act on their behalf. A breach of this relationship is reflective of the *agency problem*.
 - A *fiduciary relationship* is a relationship of trust and confidence or of confidential relations. The critical feature of a fiduciary relationship is that the fiduciary undertakes or agrees to act for or on behalf of, or in the interests of, another person.
 - *Breen v Williams* (1996) 186 CLR 71, 92 per Dawson and Toohey JJ: There are accepted fiduciary relationships, such as trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners, which may be characterised as relations of trust and confidence.
- An **agent** is simply one person who has authority to create legal relations between a principal and third parties. This legal meaning may differ from commercial use (i.e. when someone calls themselves an 'agent'): *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644
- Classification of agents:
 - Special agent: authority to carry out only one task that is not part of their profession.
 - General agent: authorised to act in a class of transactions (or only one, that is performed as part of their trade or profession).
 - Universal agent: authorised to act in all matters. E.g. power of attorney.
- Creation of agency:
 - An agency relationship can be created by: express or implied agreement, ratification, pursuant to the doctrine of undisclosed principal, *by cohabitation, and by necessity*.
 - Authority of agents:
 - Actual authority:
 - Express actual authority can be given either in writing or orally.
 - Implied actual authority will arise from the circumstances.
 - Apparent authority: is where someone by their conduct leads others to believe that another person is their agent. Though no actual authority is given, the person whose conduct causes this belief will be estopped/prevented from asserting that the other person is not their agent.
 - Operation of law via necessity or cohabitation or marriage.
- In addition to contractual duties owed to the principal, an agent owes fiduciary duties by virtue of their relationship. An agent has a duty to:
 - 1. Follow instructions (*Betram, Armstrong v Gofrey* (1830) Knapp 381; 12 ER 364)
 - 2. Act in person (not delegate if they have special skills) and exercise diligence, care and skill (*Keppel v Wheeler* [1927] 1 KB 577)
 - 3. Act in the interest of the principal, which includes:
 - (a) maintaining confidentiality
 - (b) making full disclosure; and
 - (c) not making a secret gain or profit (*McPherson v Watt* (1877) 3 App Cas 254)
 - 4) Take care of the principal's property
 - 5) Keep separate (personal) accounts; and

- 6) Keep proper accounts and make these accounts available for inspection
- Rights of agents, either expressly or by implication include:
 - The right to remuneration
 - The right to indemnity and reimbursement (for expenses)
 - The right of lien (to retain the principal's goods until they are reimbursed/remunerated)
 - The right of stoppage *in transitu* (stopping goods in transit if the principal is unable to reimburse them, and then exercising a lien over the goods).
- Liabilities of agents:
 - Where an agent discloses the existence *and* name of the principal to a third party, the agent will not be liable to that party.
 - Where an agent discloses the existence but *not* the name of the principal to the party, the third party cannot take action against the agent.
 - Where an agent does not disclose the existence of a principal, the agent will be personally liable, but if they third party becomes aware of the principal's existence, that party may choose to sue the principal instead.
- Where an agent has acted outside the scope of their authority, and has represented to a third party that they have the authority to act, that agent can be sued by the third party for a breach of their warranty that they had the authority to act.
- Termination of agency:
 - The parties can terminate the agency: by agreement, revocation of authority, renunciation by the agent, dismissal by the principal because of an agreement breach, or by performance.
 - The agency can be terminated by operation of law: by expiration of a specific time, death, insanity or bankruptcy, frustration of contract, illegality, by the principal becoming an enemy alien, or by destruction of the subject matter.

The Law of Partnership

- The relevant legislation is the *Partnership Act 1892 (NSW)*
- A **partnership** is the relationship which exists between persons carrying on a business in common with a view to profit and includes an incorporated limited partnership (PA s 1(1)).
- Restriction on size of partnership:
 - Generally 2-20 members, per s 115 of the *Corporations Act 2001*.
 - The *Corporations Regulations Act 2001* has some exceptions for professions. E.g. legal practitioners can have up to 400 partners, accountants can have up to 1000 partners.
- A partnership will have a name registered under the *Business Names Registration Act 2011*.
- Partnership law derives both from case law and from statute law.
- The *Partnership Act 1892 (NSW)* s 1(1) provides three elements that must be satisfied in order to establish the existence of a partnership:
 - 1) the carrying on of a business;
 - PA s 1B: Business includes trade, occupation and profession.
 - However, it is not necessary that all partners personally participate in the day-to-day work of the business or in direction and management.
 - Carrying on a business 'in common' requires a relationship of agency, where each party carrying on business is acting on behalf of the others.
 - 'Carrying on a business' raises the issue of whether there needs to be continuous activity or repetitiveness of action. (continuity does not matter, according to the Canny case; it does matter according to the Smith case):