

Sample

Week 1 outline:

1. Source of corporation law
2. -What is a corporation,
 - Key features: separate legal entity and limited liability
 - Regulated by corporation act 2001
 - Registration procedure
 - post registration requirement
3. -classification by liability: 4 types of companies, limited by shares, limited by guarantee, unlimited liability and no liability
 - classification by membership: 2 types of companies: propriety company (small and large) and public company
 - parent and subsidiary companies
 - changes of co status
 - limited liability
4. Advantages and disadvantages of companies
5. ASIC
 - legislation ASIC administers
 - ASIC's Aims and priorities
 - What does ASIC do
 - ASIC company law functions
 - power to investigation
 - enforcements: civil penalties, criminal penalties, enforceable undertakings, civil action, administrative actions, penalty notice and enforcement of directors' duty.
 - response to misconduct
6. Other bodies

Week 2 outline

1. Salomon case: separate legal entity, *Andar Transport Pty Ltd v Brambles Ltd* (2004) 206 ALR 387, *WINLAND ENTERPRISES GROUP INC. v. WEX PHARMACEUTICALS INC.* [2012] HKCA 155; [2012] 2 HKLRD 757
2. Practical impact of separate legal entity principle
 - There's a distinction between personal and company debts (*Salomon's case*);
 - There's a distinction between personal and company assets (*Macaura's case*);
 - It's possible for a person to act in dual capacities, as director and employee (*Lee's case*);
 - It's possible for the company to be liable in tort (negligence) to a member/controller (*Allyacht Spars case*; *Andar Transport case*)
 - *Hobart Bridge Co Ltd v FCT* (1951) 82 CLR 372:
3. Nature of company
 - veil of corporation, Tax avoidance v tax evasion
 - lifting the corporation veil:
 - To avoid legal obligation (*Gilford Motors case*; *Jones v Lipman*)
 - to assist in a director's breach of fiduciary duties (*Bestobell*)

case)

- As a sham (*Gilford Motors* case)
- for fraud (*Darby* case)
- As alter ego/ agency grounds (*Smith, Stone Knight* case; *Bird*

Cameron case)

- to trade with the enemy (grounds of public interest)
- to evade tax
- as a puppet (to avoid maintenance upon divorce)

-legal position in England

4. Treatment of corporation groups

- Separate entity

-reasons for corporate groups, lifting the corporation veil for corporate groups

5. Corporate liability

-contractual liability, seal, contracting with agents, indoor management rule, exceptions of indoor management rule

6. Northside case

Week 3 outline

1. Memo and articles

2. After 1998, companies can choose the rules of international management, exceptions

3. Examples of replaceable rules

4. Legal effect of constitution and replaceable rules

-Section 140

-Hickman v Kent

-Eley's case

5. Altering the constitution

-special resolution s136

-limited freedom

-protection under equity

6. Corporate Governance

7. Why need corporate governance

8. Common themes in corporate governance

9. Main corporate governance rules: mix of laws and self regulation

10. Some areas in corporate governance

-directors' duties

-Members' rights

-Members' remedies

-internal corporate organs

-internal management rules

-Market disclosure rules

-auditors

-compliance, ASX listing rules

-board structure

11. ASX corporate governance principles
12. ASX corporate governance principles, some current issues
13. Corporate social responsibility

Week 4 outline:

1. -Directors
 - Types of directors
 - who is a co director; 3 types including shadow director
 - who can be appointed as a director
 - removal of directors
 - division of corporation power
 - Who is co's officer?
2. Directors' duties
 - general law: fiduciary duty
 - corporation act
3. Good faith:
 - general own duty to whole shareholders not individual shareholders
 - interest of creditors
 - Interest of employees, customers and community interest, payments to employees.
 - Interest of the company
 - Corporation groups
4. Proper purpose: directors can do and cannot do
Text
5. Conflicts interests: cases for no conflict role, directors' defenses and disclosure.
6. -General law remedies
 - statute remedies
7. ASIC V Adler
8. Relief from liability

Week 5 outline

1. Duty of care
 - main cases
 - purposes
 - source of duty of care
 - breach of duty of care
2. S180(1) duty of care and diligence
 - enforcement
3. Directors' duties to exercise duty, skill and diligence
 - traditional way
 - modern way
 - non-executive director and chairman
 - Skill requirement
4. Centro's case: facts, legal issues, reasons, decision, issue on reliance of others,

penalty and implications

5. James Hardie case, about James Hardie, legislation, issues, arguments, ASIC V Macdonald, Shafron, Gillfillan v ASIC, final results of James Hardie
6. HIH case study
7. Defenses for breach of duty of care
8. Legislation 180-184

Week 6 outline

1. Insolvent trading 588H/G, purpose, requirements, statutory presumptions
2. Defenses of 588H
 - Director can avoid personal liability if they can prove any 1 of these defences
 - 588H(2): Expectation of solvency on reasonable grounds;
 - 588H(3): Reasonable reliance;
 - 588H(4): Absence due to illness or for 'some other good reason';
 - 588H(5): All reasonable steps to prevent debt
3. Legal consequences of insolvent trading
4. Shareholders' remedies
5. Oppression remedy
6. Statutory derivative action, including meaning, reasons for SDA, bring the SDA, and issues
7. Winding up
8. Other remedies
9. Case study: Cambotto
10. Factors influencing choice of remedy
11. Legislation 588G/H

Week 7 outline

1. Why regulate disclosure and policy considerations
2. Proprietary company- prohibits from disclosure
3. -Meaning of securities
 - Meaning of an offer: slightly different with invitation to treat
4. Statutory exemptions S 708, 708 AA, ASIC V Maxwell
5. Types of disclosure documents:
 - prospectus
 - short form prospectus
 - profile statement
 - offer information
6. Prospectus, law reform, shortcomings in prospectuses
7. Other investor protection measures, role of ASIC: *ASIC v Axis International Management Pty Ltd (No 6)* [2011] FCA 811 (21 July 2011),
8. Civil liability –who can be sued?
9. Statutory defences
10. common law remedies
11. Meetings:
 - types of meetings

- purpose of AGM
- procedure of meeting
- requirements
- quorum requirements
- voting and proxies

12. resolutions

- types
- Doctrine of unanimous consent

13. minutes

14. chairperson

15. remedies for procedural defects

Week 8 outline

Source of corporate finance

1. Shares

- feature of shares
- feature of debt.

2. Nature of shares

3. Types of shares:

- Liability to contribute share capital: fully paid and partly paid, problems: Brisconnections and new rule of ASX, issue of share with no consideration
- ordinary shares and preference shares, types of preference shares

4. Variation of class of rights

5. Debentures

- Nature
- Types
- duties of borrowing
- Security interest

6. Receivership

- receiver's duty, power, obligation
- end of receivership

Week 11

1. Choosing a business structure

Liability (extent of personal liability of owner to 3rd parties and capacity to protect personal assets)

Management and control (extent to which owner desires to retain this)

Capital (financial resources available including start-up capital, capacity to raise finance, availability of assets to raise finance)

Profits and taxation (ownership and division of profits, rates of taxes, legitimate tax minimisation)

Fees and costs (set-up fees and ongoing costs)

Restructuring/retirement/admission of extra people (flexibility to restructure in changing circumstances)

Estate planning (ease of transferring ownership interests, succession, social

security entitlements)

Regulation (complexity, compliance costs, mandatory reporting, penalties for breach)

2. Sole trader

Advantages	Disadvantages
Minimal formalities/regulation (register business name; register with tax office)	Unlimited liability (note different types of insurance)
Total control	Limited capital/ management resources
No sharing of management/profits	Limited life (no perpetual succession)

3. Partnership

Advantages	Disadvantages
Informal and inexpensive (oral, written, implied agreement and conduct 'partnership by estoppel')	Unlimited liability for debts and obligations of firm <i>But note: Limited Partnership</i>
Greater capital/management resources than sole trader	Agency relationship
s 115 CA limits size to max 20 partners, unless professional pship (accountants 1000, lawyers 400 and actuaries/ doctors 50 partners)	Joint liability for contracts
Tax benefits for venture capital limited partnerships [investment in high-risk areas]	Joint and several liability for tort
Financial Privacy (no registration of documents with ASIC)	Limited life (no perpetual succession)

- Each state/territory has Partnership Act (largely uniform throughout Australia)
- Modelled on UK statute (1890)
- Partnership Act states rules of common law and equity continue to apply, except where inconsistent with Act.
- Law of partnership is therefore a mixture of statute, common law and equity.
- Note: a partnership is called a firm.

Does partnership exist?

- **Commercial relationships:** *Duke Group Ltd v Pilmer*:

'there are many ways in which people will combine in some human endeavour in the hope and expectation of making or enhancing a profit by so combining ... Simply because they do so ... does not mean that they are in partnership.'

- **Definition:** A partnership is defined in section 1 of the *Partnership Act 1892*

(NSW) as the ‘*relation which subsists between persons carrying on a business in common with a view of profit*’.

- *McLaughlin v Dungowan Manly Pty Ltd* [2010] NSWSC 187:
‘the statutory definition of partnership [test set out in s 1 of the *Partnership Act*, as supplemented by the rules set out in s 2] ...is framed in deceptively simple language but it has given rise to many problems of interpretation’

- **Legal test 1: 4 essential elements:**

- Business** (defined in s 1: means trade, occupation or profession)

- Carrying on** (generally, but not always, involves continuity and system). *Smith v Anderson* (1880) 15 Ch D 247 illustrates ‘carrying on’:

Investors in this case who formed a trust to buy specific shares did not form a partnership for this reason - the court focused on expression ‘carrying on’ and held that:

... [it] implies a repetition of acts and excludes the case of an association formed 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...

“A single adventure under our law may or may not, depending upon its scope, amount to the carrying on of a business ...

Whilst the phrase ‘carrying on a business’ contains an element of continuity or repetition in contrast with an isolated transaction which is not to be repeated the decision of this court in *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Ltd* suggests that the emphasis which will be placed upon continuity may not be heavy.”

However, Note: While continuity of operations may be a strong indication that a business is being carried on, it’s probably no longer a ‘critical’ consideration.

This probability was recognised by the High Court in *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CRL 1

- Case law shows that an isolated (single) transaction does not prevent it from amounting to the ‘carrying on of a business’
 - It is important to examine each case closely to work out the true intention of the parties (despite whatever ‘label’ the parties give to their relationship).

- Persons in common**

Test is to see if the business is being carried on *by or on behalf of all the partners*.

All partners need not be actively involved in day-to-day running of business, so long as the other persons act as agents with ability to legally bind them.

Smith v Anderson (1880) 15 Ch D 247: “The first man knows nothing of the second, and the second knows nothing of the first; they have never come into any arrangement whatever as between themselves. **There never has been anything creating any mutual rights or obligations between those persons.** They are from the first entire strangers who have entered into no contract whatever with each other...”

Partnership is a branch of agency law – it means

- Partners act as agents for each other
- there must be mutual rights and obligations

Checker Taxicab Co Ltd v Stone

Facts: A driver hired a taxi car from the owner of a garage. The written contract provided for the taxi to be returned to the owner's garage in good condition after each use. The driver met the expense of running the car and paid, by way of rental, an agreed percentage of his earnings derived from this activity. In a dispute between the parties, the court had to determine the relationship between the owner and the driver of the taxi

Decision: The relationship was not a partnership because it was not a business being carried on by persons in common. The arrangement comprised two distinct and separate businesses. *The owner exercised no control over the driver. There was no evidence of mutual rights and obligations between the owner and the driver. The absence of acting 'in common' meant that the relationship was not a partnership.*

-Profit:

- Must be an intention to **make** a profit and **distribute** it
- Excludes sporting and social clubs and charity organisations from the scope of partnership law

Legal text 2:

Rule 1: Co-ownership. Common ownership of property does not necessarily mean that the common owners are in partnership (are not agents of each other).

Rule 2: Sharing of gross returns. Sharing of gross returns is not enough to create a partnership.

Rule 3: Sharing of profits - does not necessarily mean that those who are sharing are partners. For example, employees sharing profits with employers and creditors sharing profits with debtors, *without more*, retain their status as employee and creditor.

Was a lender who shares profit a partner?

Re Megavand; Ex parte Delhasse (1878) 7 Ch D 511

C lent 10,000 pounds to A and B to start a business – written contract stated:

- it was a loan and C was not a partner;
- C was to share profits and losses up to 25%;
- C was entitled to examine the partnership books anytime;
- C was entitled to a quarterly statement; and
- The 'loan' was not repayable until the partnership was dissolved.

The business failed and C sued as a creditor – was C a creditor or partner?

“The question is what the true intent is and meaning of the contract between the parties, and what is the true legal effect of the legal transaction between them, which must be gathered from the whole instrument and not from a few words in it which may have been inserted for some purpose or other. Every word ought to have its weight and ought to be well considered.

If ever there was a case of partnership this is it. There is every element of partnership in it. There is the right to control the property, the right to receive

profits, and the liability to share in losses.” The loan was the firm’s only capital.

Proper approach: Existence of a partnership must be determined by examining the terms of the parties contract and the course of dealing between them – from these sources, their intentions must be gathered. The whole scope of agreement ought to be looked at before any presumption of intention can properly be made at all: *Badeley v Consolidated Bank* (1888)

4. Partnership liability

- Unlimited liability; *Note: limited partnership*
- Agency relationship (s 5);
- Joint liability for contracts (s 9);
- Joint and several liability for tort (s 10);
- Joint and several liability for misapplication of money or property (s 11);
- Liability by holding out/estoppel (s 14) in the case of an apparent partner;
- Fiduciary relationship – common law principles codified (in ss 28-30).

Agency relationship:

- Every partner is an agent of the firm.
- A partner has the power to bind the other partners:
 - (1) When doing ‘business of the kind carried on by the firm’; must show transaction is within scope of the kind of business carried on by the firm
Mercantile Credit Co Ltd v Garrod [1962] 3 All ER 103: A and B partners in a garage business. Without authority from B, and in breach of partnership agreement, A sold a car which he did not own to C. C was able to get a refund from innocent partner B – the sale was ‘an act for carrying on in the usual way business of the kind carried on by the firm’
 - (2) It is carried on ‘in the usual way’ (ie actual authority), unless the partner has no authority and the outsider knows this. Even if the action by the partners is within the scope of the firm’s business, the other partners may not be bound if the action is carried out in an unusual manner (latter should put 3rd party on notice that partner may not have authority to bind the firm): *Goldberg v Jenkins* (1889) 15 VLR 36: partner borrowed at over 60% interest when normal rates were between 6-10% at the time. Borrowing was within normal business, but borrowing at that rate was not ‘the usual way’. Firm not bound.

Note: innocent partners may still be liable for the actions of a partner who has acted beyond actual or apparent authority if the firm has *ratified* (approved) the action (either expressly or impliedly).

Note: if there is a limitation on a partner’s authority, then an outsider *who knows* of it cannot enforce an action by the partner which exceeds the limitation.

If the one partner raises finance using the firm as collateral (security) if the partner's purpose has nothing to do with firm's ordinary course of business – this is the partner's private business and personal liability (reinforced in s 7) – unless authorised by the other partners.

Contract liability

- All partners are *jointly liable* for partnership contracts (s 9)
- Joint liability means collective liability or shared liability (or 'all liable together').
- Partners are sued together in only one legal action (brought against the firm, rather than naming each partner individually and running the risk of leaving out a partner's name).
- Judgment in the firm's name will bind all the partners.
- Note – any internal arrangements on allocation of firm's liabilities is not binding on **outsiders** who have a claim against the firm.

Tort liability

- Each partner is jointly and severally liable for any tort committed by the firm (s 10).
- 'Several' means separate or individual.
- This means that an innocent partner faces potential unlimited personal liability for tort even if the partner is not to blame. See *Lloyd v Grace, Smith & Co* [1912] AC 716
- *Polkinghorn v Holland* – a firm of lawyers liable for negligent financial advice given by a partner who was acting in the ordinary course of business and with apparent authority
- Note: a partner is not liable for a partner's fraudulent conduct if it occurred outside the ordinary course of partnership business – *National Commercial Banking Corp v Batty* [1986] HCA 21

Crime liability

- A partner is not liable for the criminal activities of another partner – unless it is a strict liability offence where proof of a guilty mind is not required (for eg, as in some occupational health and safety offences) – s 12
- A partner may face criminal liability as an accessory to a crime.

Misapplication of money or property liability

- Liability here is joint or several (like liability in tort): s 11
- This means that the firm is liable to make good the loss arising from misapplication of money or property by a partner. See *Mann v Hulme* (1961) 106 CLR 136
- This section does not apply if the partner receives money or property *privately* (and not as partner of the firm)

Misapplication of trust property

- The firm is liable for improper use of trust property for partnership purposes *if the innocent partners are implicated in the breach of trust* (ie they are aware of mis-use of trust money brought into the partnership by a partner who is acting as trustee for 3rd party beneficiaries): s 13.

- Otherwise, the errant partner has individual liability.

Estoppel liability

- A person (who is not actually admitted as a partner) can make the other partners liable (in contract, tort) on the basis of being held out the world to be a partner (as an apparent partner): s 14
- This is otherwise known as liability by estoppel (a rule of evidence which prevents denial of certain representations)
- A non-partner can become liable as a partner on the basis of holding out/estoppel if the following criteria in s 14 are met:
 - (1) if by words or conduct the non-party knowingly allows themselves to be represented as partners;
 - (2) credit was given to the firm on the faith of that representation; and
 - (3) the 3rd party (outsider) relied on the representation

Lynch v Stiff (1943) 68 CLR 428: Williamson, a lawyer, practised under the name of 'John Williamson & Sons'. The firm's letterhead included the name of 'D' as partner.

- P had always dealt with D for legal advice and invested money with the firm which was stolen by Williamson.
- P successfully sued D for compensation on the basis that D was held out to be a partner and credit was given to the firm based on the representation.

Retiring partner's liability

Retiring partners (of a continuing firm) should take the following precautions (to prevent from being liable as an apparent partner):

- give actual notice to existing 3rd parties such as clients;
- to avoid liability to future 3rd parties, should give public notice of retirement in local newspaper or government gazette;
- remove their name from the firm's stationery and office;

5. fiduciary relationship

Fiduciary relationship – means:

- each partner owes to the other the equitable duty of honesty, loyalty and good faith
- partners must always act in the best interests of the partnership (and put partnership interests ahead of personal interests)

Duties of a fiduciary (partner) include:

- The 'no conflict' rule
- The 'no profit' rule
- The 'undivided loyalty' rule
- The 'duty of confidentiality'

• **Note:** Such duties also owed by director/promoter to the company (class 6; 8-9); by trustees to beneficiaries; by agents to principals

s28: duty of partner to render accounts (ie make full disclosure to one another on all matters affecting the partnership and the partner must not profit by competing with the firm)

s29: duty of partner to account for private profits (ie partner is

accountable to the firm for private profits made (from partnership property, information or opportunities) without the consent of the other partners:

Birtchell v Equity Trustees (HCA) Partner in a real estate firm shared land speculation profits with the firm's client without disclosure to the other partner. High Court ordered the partner to account to the firm for the partner's share of the profits because the partner pursued his separate interest instead of joint interest – and excluded the partnership from a chance to benefit/profit from an opportunity connected with the firm.

s30: duty of partner not to compete with the firm (ie cannot do so without consent of the other partners)

Duration of fiduciary duties: The duration of fiduciary duties also extends to any opportunities that arise after dissolution of the partnership but before the affairs of the partnership are wound up — as illustrated by the High Court's decision in *Chan v Zacharia* (1984) 154 CLR 178

Chan v Zacharia (1984) 154 CLR 178:

Facts: Chan and Zacharia, partners in a medical practice, dissolved their partnership. Lease on the premises in which they conducted their surgery, was a valuable asset of the firm. Option to renew the lease had to be undertaken by both the partners. After dissolution, but before the winding up of the partnership affairs, Chan sought to exclude Zacharia from practising there by taking up a new lease in his own name alone. In this way, Chan sought to continue the medical practice on his own.

Decision: Chan breached his fiduciary duty by failing to act with perfect fairness and good faith and was accountable for that private profit.

Chan abused his fiduciary position as a trustee and former partner to seek an advantage for himself and in which he subjected the performance of his fiduciary obligations to the pursuit of his personal interest.

The partners are under a **fiduciary duty** towards each other to:

- render true accounts;
- account for private profits; and
- Refrain from competition with the partnership firm.

6. Partnership property

- The acts and intentions of the parties will show whether property owned by a partner become partnership property;
- Generally, all property brought into the partnership or acquired later will become the property of the firm – these assets will belong the partners collectively;
- Each partner has a beneficial interest in every asset of the partnership
- The partner's share in the partnership is not a title to specific property *but a right to a proportion of the surplus after the realisation of assets and the payment of debts and liabilities:* s 20

7. Dissolution of partnership:

Without a court order (ss31 A-34):

- By retirement (in a partnership at will)

- By the giving of notice
- By completion of the agreed period
- By death or bankruptcy
- By illegality

With a court order (s35):

- Mental disorder or permanently incapable;
- Guilty of misconduct prejudicial to the firm;
- Breach of the partnership agreement;
- Business can only be carried on at a loss;
- On grounds that are 'just and equitable' (judicial discretion)

8. Final settlement of accounts

Creditors' debts are given priority – to be repaid first.

Thereafter, s 44 of the Act provides for repayment according to the following priority (subject to the partnership agreement):

- partner's advances (loans);
- partner's capital; and
- remaining assets (the ultimate residue) – to be divided in the same proportion in which the profits are distributed.

9. Limited partnership:

Limited partnerships are an alternative to limited liability companies because of their simplicity. All the states have passed limited partnership legislation.

A limited partnership consists of at least one general partner:

- Their capital contribution on entering the partnership will determine the extent of their liability for the debts of the firm;
- Their role is to manage the limited partnership and their role is the same as a partner under partnership law.

Limited partners are not liable for debts beyond their capital contribution.

Registration is required in all states.

10. Joint ventures

Joint venture is a type of business structure that is commonly used today, particularly in high risk capital, or high risk enterprise activities. The joint venturers are able to bring in different skills or assets, or a combination thereof, into the enterprise. Typical examples of where a joint venture might be used are in: mine explorations,

- property development,
- construction,
- manufacturing,
- publishing,
- entertaining,
- hospitality management and
- share farming ventures.

A proper (pure) joint venture is something other than a partnership. The activity of a joint venture is joint but little else is intended to be joint – parties contract on commercial terms at arm's length

But note, however: A joint venture may be a partnership (with all of its legal consequences, including fiduciary duties of loyalty and joint liability) if it fulfils the partnership tests of ‘business in common with a view of profit’ – this outcome, however, will depend on the facts of each case.

Daoud v Boutros [2013] NSWSC 687:

- A commonly stated distinction between a partnership and joint venture is that partners share profits arising from what is usually a business activity involving some continuity, whereas joint venture participants share product from what is usually [but not always] a single project or undertaking.”

- It has been observed in a number of cases, including *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 that the term "joint venture" does not have a settled common law meaning.

United Dominions Corp Ltd v Brian, Dawson J suggested that a *joint venture* was more like an association of people who engage in an enterprise, *to produce a product which will be shared* amongst the participants, whereas a *partnership* was more like a common adventure where the *outcome is profit sharing [cash] rather than product sharing [ie. product generated from joint activity]*.

The term ‘joint venture’ is not a technical one with a settled common law meaning. It means:

“...an association of persons for the purpose of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill. [Such a joint venture ... will often be a partnership].”

Joint ventures distinguished from partnerships:

- usually *ad hoc* undertaking for a specific task or time
- it is a separate venture for each of the parties
- assets are usually held as individual shares as tenants in common
- liability is individual (separate)
- profits are received separately
- invoices are usually issued separately and paid individually
- the parties can dispose of their interest in a joint venture without the need to assign
- The activities of a JV are of specific duration or for a limited purpose (“one-off” project), whereas the activities of a partnership are often continuing and indefinite
- The liability in JV is individual rather than joint and several as in a partnership
- Joint venturers can, subject to agreement, freely dispose of their interest (property or share) in the joint venture, whereas partners need to assign their interest and do not enjoy this general freedom
- The parties in a JV are not necessarily in a fiduciary relationship, whereas partners owe each other fiduciary duties.
- The joint venture is a separate venture for each party.

- The joint venturers receive a share of the product, whereas partners share profits [cash] — as demonstrated by the key statement in *United Dominions case*.

Is labelling conclusive?

- Often a joint business arrangement is treated as joint ventures until the venture loses money – then, the party bearing the greatest loss may claim the arrangement is really a partnership (so that losses can be shared)

- In such situations, the court will examine the real purpose and nature of the arrangement and is free to come to its own conclusion despite whatever labels the parties used

- Labels placed by parties on their commercial relationship is not conclusive proof of the relationship's true nature.

- courts can and will disregard such labels (such as JV) if they do not accurately reflect the facts – see *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 where High Court held that what the parties had termed a joint venture was in fact, in intention and in law, a partnership.

Precautions:

To avoid partnership label, proper care to formally document venture – includes:

- ensure one-off venture, not a business;
- focus on sharing of product generated by venture;
- specifically exclude other aspects of partnership – eg joint and several liability and agency relationship; and
- specifically exclude operation of fiduciary duties (ie. base entire agreement on contract)
- consider creating a corporate jv vehicle

Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd [2013] FCAFC 29 (12 March 2013)

Features of JV

- Formalities: can be minimal or complex depending on commercial activity – there is no specific body of law on jv – governed by contract law and other laws that regulate the particular project (for eg compliance with mining law; compliance with co law if co used as business structure; jv may be incorporated, by each party taking shares in a jv company and adopting written shareholder agreement, or remain unincorporated)

- Control/management (by joint committee)
- Liability (individual – not joint [unless it's a partnership])
- Fiduciary duties (parties can expressly contract out of such duties –

ASIC v Citigroup Global Markets Australia [2007] FCA 963)

- Property (each party has its own share as tenants in common);
- Taxation (each party liable for own tax; unlike partnership, no joint tax return);

- Accounting and tax treatment (for income and expenses; each party

adopts their own);

- Duration (depends on completion of project; expiry of time; default)