created between the principal and third parties prior to the notice. The right of the principal to revoke the agent's authority may be limited or affected by the rights of third parties and the agent. The agent may renounce the agency at any time but must compensate the principal for any loss caused by the renunciation.

Death of the principal terminates the agent's authority even though the agent is unaware of the death. The agent becomes personally liable to third parties for breach of warranty of authority even though the agent was ignorant of the principal's death.

Insanity ends the contract of agency (*Yonge v Toynbee* [1910] 1 KB 215). However, a third party is entitled to treat the authority of the agent as subsisting until they receive notice of the insanity where the principal, before becoming insane, had held out the agent as having authority.

The bankruptcy of the agent terminates their authority, except where the bankruptcy does not affect their capacity to contract as agent. The bankruptcy of the principal terminates the agency. However, an agent may do whatever is necessary to complete a transaction which was already binding on the principal before the bankruptcy.

2. Partnerships

"Whatever may amount to a partnership…it is a contract of some kind undoubtedly — a contract like all contracts, involving the mutual consent of the parties" (*Pooley v Driver* (1876) 5CH D 458 at 472 (Jessel MR)). Therefore:

1. The question whether the relationship is a partnership is a mixed question of fact and law that is determined by looking (objectively) at the parties' intentions as it appears from the surrounding circumstances (including any written agreement); and deciding whether the relationship is one that the law recognises as a partnership; and
2. If the relationship is a partnership the matters relating to it (e.g. duration; how the business is conducted; rights and liabilities of the partners) is left to the partners to agree. This is reflected in numerous provisions of the *Partnership Act 1958* (Vic) which are stated to be "subject to any agreement" or apply "unless the contrary intention appears."

A partnership can arise by deed, from a simple contract, orally, partly in writing and partly orally or by implication from the parties' conduct.

"Partnership is the relation which subsists between persons carrying on a business in common with a view of profit and includes an incorporated limited partnership within the meaning of Part 5." (s5(1) *Partnership Act 1958* (Vic)).

In circumstances where either a party to the purported partnership or a third party is attempting to establish that a partnership exists, they will need to prove that this provision is satisfied, that is, that the purported partnership was:

1. Carrying on a business.

   The definition of 'business' in this provision includes every trade occupation or profession, but does not include clubs and other groups formed for non-profit or non-business purposes (s3 *Partnership Act 1958* (Vic)).

   Evan v FCT (1989) 20 ATR 922

   In this case, Evans won over $800,000 gambling on horses and greyhounds. Generally, gambling earnings are not regarded as being taxable, however, the Australian Taxation Office included Evans' winnings as part of his taxable income on the basis that. it was income derived from conducting the 'business' of punting. The Court found that Evans was not conducting a business.

   "The question of whether a particular activity constitutes a business is often a difficult one involving as its does questions of facts and degree. … There is no one factor that is decisive of whether a particular activity constitutes a business. … Profit motive, scale of activity, whether ordinary commercial principles are applied, characteristics of the line of business in which the venture is carried on, repetition and permeant character, continuity and system are all indicia to considered as a whole, although the absence of any one will not necessarily result in the conclusion that no business is carried on." (Hill J at 939).

   A 'business' is an active occupation; and 'carrying on a business' impliedly means that there needs to be a degree of continuity in the conduct of that activity. Therefore, a single act of selling a house or building a shed or repairing a car, for example, will generally not constitute a business.

   "The expression 'carrying on' implies a repetition of the 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 the business." (*Smith v Anderson* (1880) 15 CH d 247 (Brett LJ)).

   Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd (1974) 131 CLR 321

   The Court concluded that the 'joint venture' was in fact a partnership based on the following considerations:

   a. The parties became joint venturers in a commercial enterprise with a view to profit.

b. Profits were to be shared (sharing of profits is prima facie evidence of partnership (s6(3) *Partnership Act 1958* (Vic))).

c. The policy of the joint venture was a matter for joint agreement and it was provided that differences relating to the affairs of the joint venture should be settled by arbitration.

d. An assignment of a half interest in the contracts for the appearances of the musicians was attempted; this was seen as an attempt by the parties to transform the subject matter into partnership property.

e. The parties were concerned with the financial stability of one another in a way which is common with partners.

Therefore, the Court determined that what the parties label the relationship is not conclusive as to whether it is a partnership or not.

United Dominions Corporations Ltd v Brian Pty Ltd (1085) 157 CLR 1

"In the present case, it is apparent that the relationship between the participants in the shopping centre venture was a fiduciary one, at least from the time when the formal agreement was executed. Under the agreement, the participants were joint venturers in a commercial enterprise with a view to profit. Profits were to be shared. The joint venture property was held upon trust. The participants indemnified the managing participant (SPL) against losses. The policy of the joint enterprise was ultimately a matter for joint decision. Apart from the absence of any reference in the agreement to 'partnership' or 'partners', the relationship between the participants under the agreement exhibited all the indicia of, and plainly was, a partnership. It is true that UDC came to the joint venture in the role of prospective financier and, in so far as borrowings from it by the SPL group on behalf of the partnership were concerned, occupied the role of lender as well as that of partner. In so far as the property which was the subject of the joint venture was concerned however, the fact that UDC was a lender to SPL on behalf of the partnership did not absolve it from the ordinary fiduciary obligations of a partner." (Mason, Brennan and Deane JJ).

"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) Pty Ltd* (1974), suggests that the emphasis which will be placed upon continuity may not be heavy. Certainly each of the enterprises which were to be undertaken and the enterprise which was finally undertaken in this case, was to have an operation which was sufficiently extended to amount to the carrying on of a business and, since the

association was with a view to profit, the conclusion is warranted that the parties were either in partnership or were negotiating partnership at the relevant time." (Dawson J).

2. In common

   This element of the definition of partnership requires that there must be some participation in a common business. This means that the parties must be engaged in the same business.

   Checker Taxicab Co Ltd v Stone [1930] NZLR 169

   In this case, the Court had to decide whether Checkers, who owned a taxi and hired it out to a driver, was liable for the negligent driving of the driver. Checkers could only be liable if the driver was either an employee or partner. The court came to this conclusion that Checkers was neither, because on a true construction of their relationship the driver Checkers and driver were conducting separate business — Checkers was renting out its cars to be used as taxis, and the driver was renting the car to generate income as a taxi driver.

   The term 'in common' does not mean that that all the parties must take an active part in running the business — it means that the business must be carried on behalf of the partners. This is a question of fact determined with reference to all the relevant facts and circumstances of the arrangement.

   Lang v James Morrison & Co Ltd (1911) 13 CLR 1

   In this case, Lang could only found to have been a partner if James Morrison could show that McFarlane had "carried on the business of Thomas McFarlane & Co on behalf of himself, Lang and Keates, in the sense that he was their agent in what he did under the contract with [James Morrison] – not that they would get the benefit, but that he was their agent." (Griffith CJ). This can be referred to as a mutuality of rights and obligations.

3. With a view of profit.

   "A view to ultimate profit is essential in a partnership" … but "it has not been essential that there be a profit-making motive in the short term" (*Minter v Minter* [2000] NSWSC 100 [92], Santow J).

   Therefore, carrying on a business in the expectation of initial losses will still be views as being carried on "with a view of profit" if the parties intend that it will ultimately earn profits.

However, the courts have found there to be a partnership even in cases where the association between the parties was for a single venture. This suggests that the 'carrying on' of a business may no longer be critical in determining whether the relationship is a partnership. Instead, what is more important is that the it is a commercial venture entered into with the requisite intent. This means

that a consideration of the parties' objective intention is required to determine whether a partnership exists.

Under s6 of the *Partnership Act 1958* (Vic), the following rules should be used to assist in determining whether a partnership exists:

1. "Joint tenancy in common joint property common property or part ownership does not of itself create a partnership as to anything so held or owned whether the tenants or owners do or do not share any profits made by the use thereof" (s6(1)).

   Essentially, co-ownership of property (in any way) does not necessarily create a partnership.

   Cripps v FCT (1999) 43 ATR 1202

   In this case, a husband and wife who rented jointly owed several properties were held not to be in a partnership because their activity was investment through co-ownership and did not constitute "carrying on a business".

2. "The sharing of gross returns does not of itself create a partnership whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived" (s6(2)).

   The term "gross returns" means revenue before the deduction of expenses.

   Cox v Coulson [1916] 2 KB 177

   In this case, the operator and manager of a theatre (Coulson) hired the theatre out to a theatrical company and received 60% of the gross box office receipts. A patron sued Coulson after they were injured when accidentally shot by a performer. The Court held that Coulson was not liable either as the performer's employer or as the theatrical company's partner.

3. "The receipt by a person of a share of the profits of a business is prima facie evidence that that person is a partner in the business, but the receipt of such a share or of a payment contingent on or varying with the profits of a business does not of itself make that person a partner in the business and in particular:

   a. The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make that person a partner in the business or liable as such;

      This provision reflects the common law rule that the mere sharing of profits in a business in payment of a debt of other liability does not necessarily make the recipient of that share a partner. That is because that right arises from the separate relationship of creditor and debtor and not from the recipients participation in the business of the partnership (see *Cox v*

Hickman (1860) 8 HL Cas 268 and *John Bridge & Co Ltd v Magrath* (1904) 4 SR (NSW) 441).

Re Ruddock (1879) 5 VLR (IP&M) 51

In this case, the debtor sold a quarter share of his business in exchange of the creditor discharging the debt (this entitled the creditor to a quarter of the profits). The creditor was held to be a partner even though she did not participate in the managing the business.

b. A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such;

   Therefore, incentive payments and bonus tied to profits do not on necessarily make the employee a partner. Agency and partnership relationships are separate legal relationships, and while a partnership will always involve an agency, an agency does not become a partnership just because there may be sharing of profits as between the principal and the agent. It is always a matter of the intention of the parties.

c. A person being the spouse, domestic partner or child of a deceased partner and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner is not by reason only of such receipt a partner in the business or liable as such;

d. The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits or shall receive a share of the profits arising from carrying on the business does not of itself make the lender a partner with the person or persons carrying on the business or liable as such: Provided that the contract is in writing and signed by or on behalf of all the parties thereto;

   This provision is related to s6(3)(a) regarding debts paid out of profits. Both provisions deal with the distinction between a partnership relationship and a relationship between a creditor and debtor.

   Lending arrangements such as these include terms that entitle the lender to takes steps to protect its investment, such as being given access to the debtor’s books of account, veto rights on how the borrowed funds can be use or even the raising of further funds on security of business assets. Such provisions are consistent with the lender-borrower relationship and will not be sufficient to render the lender a partner.

e. A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by that person of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.” (s6(3)(a)-(e)).