Law of Associations – case notes

Topic 1: Unincorporated Associations

	Case	Notes
(1) Nature of unincorporated non-profit associations	***Kibby v Santiniketan Park Association Inc [1999] 1 VR 861; [1998] VSC 148 at paragraphs [41-50]*** **Role of constitution**	**Facts**: A member of the Santiniketan Park Association challenged the association's governance regarding membership entitlements and exclusion. **Decision**: The court found that the association's constitution and rules acted as a contract between the members and the association. The plaintiff's rights were limited by these rules. **Legal Principles: Reinforced that members of unincorporated associations have rights and obligations strictly defined by the association's constitution, and courts will enforce these as contractual agreements**
	Wise v Perpetual Trustee Co Ltd [1903] AC 139 **Trusts** **Members not liable**	**Facts:** This case involved a trust established for the benefit of a religious or charitable purpose and examined how such a trust could be enforced when associated with an unincorporated body. **Decision:** The Privy Council affirmed that the trust was valid, emphasising that charitable or religious purposes supported by an unincorporated association could create enforceable obligations. **Legal Principles: Demonstrated the intersection between trust law and unincorporated associations, showing that an association's involvement does not void such trusts.** and **no member as such becomes liable to pay to the funds of the society or to anyone else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member**
	Re James Alexander Bacon, Steve Black and Kevin Reynolds (1989) 25 FCR 495; [1989] FCA 393 at paragraph 22 and following **Governance procedures**	**Facts**: Addressed the management and operations of a non-profit association and whether their conduct complied with the law. **Decision**: The court provided clarity on the legal governance structures necessary for unincorporated associations. **Legal Principles: Stressed that non-profits need clear and compliant governance procedures to ensure members' rights are protected**
	Bacon v Pianta (1966) 114 CLR 634 **Breach of natural justice or procedural fairness**	**Facts**: This case involved union members who challenged the expulsion of other members and the interpretation of union rules. **Decision**: The High Court upheld that the union had acted within its rules. **Legal Principles:** Reinforced that internal rules govern member rights in associations**, and courts will only intervene if there is a breach of natural justice or procedural fairness.**

Topic 3: Law of Partnership

(1) Definition of partnership

	Partnership Act, s 1, (Note also *Corporations Act 2001* (Cth), s 115)	**S1 Definition of partnership** 1) Partnership is the relation which exists between persons carrying on a business in common with a view of profit and includes an incorporated limited partnership. 2) But the relation between members of any company or association which is— a) incorporated under the Corporations Act 2001 of the Commonwealth, or b) Formed or incorporated by or in pursuance of any other Act of Parliament or Letters Patent or Royal Charter, is not a Partnership within the meaning of this Act.	
	s32 Dissolution by expiration or otherwise **implies single business instance can be a JV**	Subject to any agreement between the partners, a partnership is dissolved— (a) If entered into for a fixed term, by the expiration of that term— (b) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking— (c) If entered into for an undefined time, by any partner giving notice to the other or others of the partner's intention to dissolve the partnership. In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is mentioned, as from the date of the communication of the notice.	
	Beckingham v The Port Jackson and Manly Steamship Co (1957) 57 SR (NSW) 403 **Profit sharing is not sufficient**	Alleged Partnership: The plaintiff, Beckingham, claimed that he was a partner in a shipping business operated by "The Port Jackson and Manly Steamship Co." Nature of Dispute: Beckingham sought a share of the profits and asserted partnership rights, alleging he contributed capital and provided services to the company. Denial of Partnership: The defendant company denied the existence of a partnership, contending that Beckingham was merely an employee or had a different contractual relationship with the company. Key Evidence: The case involved examination of correspondence, financial arrangements, and the conduct of the parties to determine whether a partnership existed.	Issues: Existence of a Partnership: Did the relationship between Beckingham and the company satisfy the legal definition of a partnership under the relevant law? Profit Sharing: Was Beckingham entitled to a share of profits, and did this signify a partnership? Nature of the Relationship: Did the conduct and agreements between the parties demonstrate an intention to form a partnership? No partnership. There was a share of profits as part of renumeration. **Profit sharing is an indicator of a partnership but is not conclusive on its own.** s2(1)(1)(c) The court found no agreement or conduct suggesting that Beckingham was entitled to a share of the profits as a partner. No Control Over Business: Beckingham had no significant control over the business operations, another hallmark of a partnership.

	United Dominions Corporation v Brian (1985) 157 CLR 1 **Courts to determine if it is a partnership (not parties)**	**Background**: • United Dominions Corporation (UDC) entered into a joint venture agreement with several parties, including Brian Pty Ltd and another company, H. & G. Saunders Pty Ltd. • The joint venture involved the acquisition and development of land for resale at a profit. **Dispute**: • UDC secured a mortgage over the joint venture property to cover funds it had advanced. • Brian Pty Ltd alleged that UDC had not disclosed this mortgage when it was entered into and that this omission breached fiduciary duties owed by UDC as a joint venturer. **Key Issue**: • Whether the relationship between UDC, Brian Pty Ltd, and H. & G. Saunders Pty Ltd was one of partnership or a similar fiduciary relationship, giving rise to fiduciary obligations.	**Held** - Relationship between participants in JV was a partnership and FD arose. Affirms Canny. JV agreement had: • sharing of profits, • unanimous decision making and • said property of JV was to be held in trust for all three of them, Ownership of assets was crucial, sharing losses
(2) Determining when a partnership exists			
(a) Elements of a partnership	***Partnership Act, s 1***	**S1 Definition of partnership** 1) Partnership is the relation which exists between persons carrying on a business in common with a view of profit and includes an incorporated limited partnership.	
The carrying on of a business	***Canny Gabriel Castle Advertising v Volume Sales (Finances) Pty Ltd (1974) 131 CLR 321*** Single venture can be partnership Lenders can be partners Indica of partnerships	FM and VS entered into a joint venture to arrange a number of concerts in Australia. FM entered into contracts with 2 singers for performance. FM entered into a loan with Kenny Gabriel (who took a security charge over the assets of FM, including the ticket sales, without the knowledge of VS). FM went into liquidation. Canny had an equitable charge over the assets of FM. A partner is entitled to the property of the partnership (equitable	**Held** it was not necessary for them to have a partnership agreement but following factors showed it did: One only joint venture can still be a partnership Lenders can be partners Indicia of partnership: - Share assets - Joint decision making - Shared profits

		dissolution of the partnership, the lease of the practice premises would belong to the partnership. Following the partnership's dissolution, Dr. Zacharia negotiated and secured a renewal of the lease in his own name without Dr. Chan's consent. Dr. Chan claimed that Dr. Zacharia had breached his fiduciary duties by appropriating a partnership opportunity for his own benefit.	concerning partnership property and opportunities. Dr. Zacharia's actions in securing the lease for himself breached these duties, as the lease renewal was considered a partnership asset. This case highlights that partners must not exploit partnership opportunities for personal gain during dissolution and reinforces the principle that fiduciary duties persist until the partnership is fully wound up.
	Canberra Residential Developments Pty Ltd (2009) 69 ACSR 435 at 449-458	The case involved a joint venture between Canberra Residential Developments Pty Ltd and Brendas Pty Ltd for a property development project. The dispute arose over the fiduciary duties owed by the director of Brendas Pty Ltd, who was also a trustee company developing the land on behalf of a syndicate of builders.	**Legal Principle:** The court examined whether there was a breach of fiduciary duty by the director of Brendas Pty Ltd. The court held that there was no breach of fiduciary duty, providing a detailed consideration of both UK and Australian case law on the matter1. **Relation to Partnerships:** This case highlights the importance of fiduciary duties in joint ventures and partnerships. It underscores that directors and partners must act in the best interests of the partnership and avoid conflicts of interest.

Topic 4: A company as a corporate entity			
	Corporations Act (cth) S124	**Legal capacity and powers of a company** (1) A company **has the legal capacity and powers of an individual** both in and outside this jurisdiction. A company also has all the powers of a body corporate, including the power to: (a) issue and cancel shares in the company; (b) issue debentures (despite any rule of law or equity to the contrary, this power includes a power to issue debentures that are irredeemable, redeemable only if a contingency, however remote, occurs, or redeemable only at the end of a period, however long); (c) grant options over unissued shares in the company; (d) distribute any of the company's property among the members, in kind or otherwise; (e) grant a security interest in uncalled capital; (f) grant a circulating security interest over the company's property; (g) arrange for the company to be registered or recognised as a body corporate in any place outside this jurisdiction (h) do anything that it is authorised to do by any other law (including a law of a foreign country). A company limited by guarantee does not have the power to issue shares.	
The company as a separate legal entity	***Salomon v Salomon and Co Ltd [1897] AC 22***	Mr. Salomon, a shoemaker, converted his business into a company, *A Salomon & Co Ltd*, with his family as shareholders and directors. He retained majority control with 20,001 of 20,007 shares and received £10,000 in debentures. The company borrowed £5,000 from Broderip, secured by the debentures. When the business failed, Broderip sued, and after repayment, £1,055 remained. Salomon claimed this amount under his debentures, leaving nothing for unsecured creditors. The liquidator argued Salomon was liable for company debts. **Issue**: Was the formation of A Salomon & Co Ltd a fraud intended to defeat creditors?	**Held**: After several sets of proceedings in lower courts, the appeal landed in the House of Lords. The Companies Act 1862 (UK) did not require shareholders to be independent of the majority shareholder. A Salomon & Co Ltd was legally constituted and it was not the role of judges to read limitations into the statute in a manner that they considered preferable. Lord Halsbury: once company is legally incorporates it is an independent person with rights and liabilities of its own and these aren't influenced by the motives of the people involved in its promotion. **The company conducts its own business as a separate person.** **Affirmed the legal principle that, upon incorporation, a company is generally considered to be a new legal entity**

			his conduct and the importance of deterring similar breaches. This case establishes that quantum meruit liabilities are considered debts under section 588G, emphasising directors' duties to prevent insolvent trading and their accountability for liabilities incurred outside formal contracts.
	3M Australia v. Kermish (1985) 10 ACLR 371	The defendant was an accountant named Kemish who went to work part-time and eventually full-time for a debtor of 3M and who was eventually found to be personally liable for repayment of a debt to 3M when his employer became insolvent. While the case primarily concerned the misuse of funds and breaches of fiduciary duties, it highlights the broader obligation of directors to act in the best interests of the company, which includes ensuring that the company avoids incurring debts when insolvent. Breaching this duty, such as through financial misconduct or a failure to monitor a company's financial position, can contribute to a company's insolvency.	The case reinforces the idea that directors will be held personally liable for breaches of their duties, which is directly relevant to section 588G's imposition of personal liability on directors who allow a company to trade while insolvent. Kermish's actions in diverting funds for personal gain could exacerbate a company's financial difficulties, making insolvency more likely. **Deterrence Against Financial Mismanagement**: The court's decision serves as a deterrent against financial mismanagement by directors, which often leads to or worsens insolvency. Directors are reminded of their obligation to safeguard the company's financial position.
	Re Custom Bus Australia Pty Ltd [2021] NSWSC 1036 at [33]-[37]	Hearing focused on the separate question of whether Custom Bus was solvent or insolvent during the period from 18 July 2017 to 18 January 2018. The Plaintiffs, as joint and several liquidators of the Company, allege the Company was insolvent during this period and seek to recover unfair preference payments under the Corporations Act 2001 (Cth). The claim against several defendants had been settled or discontinued before this hearing, leaving the question of insolvency to be determined primarily for proceedings against the First Defendant, who did not contest or participate.	Summarises key insolvency cases to determine: In applying these principles, courts: • Assess all debts and their due dates. • Examine liquid or realisable assets and expected net cash flow from business operations. • Consider borrowing arrangements or financial support from lenders/shareholders. These principles ensure a comprehensive evaluation of a company's financial health and whether it can meet its obligations in real-time.

		The Plaintiffs assert insolvency based on evidence that the Company could not meet its financial obligations when due, citing extensive losses, low liquidity ratios, increasing liabilities, creditor demands, and payment plans with the Australian Taxation Office and Revenue NSW. The Company's financial difficulties were exacerbated by its inability to secure additional funding or equity, failure to meet production targets, and continued operational losses.	

Topic 5: Corporate Governance

	Case	Facts	Rule
A. CORPORATE GOVERNANCE RULES			
***Corporations Act 2001* (Cth) ('*Corporations Act*')**		**140 Effect of constitution and replaceable rules** 1) A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract: a) between the company and each member; and b) between the company and each director and company secretary; and c) between a member and each other member; under which each person agrees to observe and perform the constitution and rules so far as they apply to that person. 2) Unless a member of a company agrees in writing to be bound, they are not bound by a modification of the constitution made after the date on which they became a member so far as the modification: a) requires the member to take up additional shares; or b) increases the member's liability to contribute to the share capital of, or otherwise to pay money to, the company; or c) imposes or increases restrictions on the right to transfer the shares already held by the member, unless the modification is made: i) in connection with the company's change from a public company to a proprietary company under Part 2B.7; or ii) to insert proportional takeover approval provisions into the company's constitution.	

(1) Sources of corporate governance rules

Replaceable rules and adopted constitutions - s 141

141 Table of replaceable rules

The following table sets out the provisions of this Act that apply as re

Provisions that apply as replaceable rules		
	Officers and Employees	
1	Voting and completion of transactions—directors of proprietary companies	194
2	Powers of directors	198A
3	Negotiable instruments	198B
4	Managing director	198C
5	Company may appoint a director	201G
6	Directors may appoint other directors	201H
7	Appointment of managing directors	201J
8	Alternate directors	201K
9	Remuneration of directors	202A
10	Director may resign by giving written notice to company	203A
11	Removal by members—proprietary company	203C
12	Termination of appointment of managing director	203F
13	Terms and conditions of office for secretaries	204F
	Inspection of books	
14	Company or directors may allow member to inspect books	247D
	Director's Meetings	
15	Circulating resolutions of companies with more than 1 director	248A
16	Calling directors' meetings	248C
17	Chairing directors' meetings	248E
18	Quorum at directors' meetings	248F
19	Passing of directors' resolutions	248G
	Meetings of members	
20	Calling of meetings of members by a director	249C
21	Notice to joint members	249J(2)
22	When notice is given	249J(4)
23	Notice of adjourned meetings	249M
24	Quorum	249T
25	Chairing meetings of members	249U
26	Business at adjourned meetings	249W(2)
27	Who can appoint a proxy *[replaceable rule for proprietary companies only]*	249X
28	Proxy vote valid even if member dies, revokes appointment etc.	250C(2)
29	How many votes a member has	250E
30	Jointly held shares	250F
31	Objections to right to vote	250G
32	How voting is carried out	250J
33	When and how polls must be taken	250M
	Shares	
33A	Pre-emption for existing shareholders on issue of shares in proprietary company	254D
33B	Other provisions about paying dividends	254U
34	Dividend rights for shares in proprietary companies	254W(2)
	Transfer of shares	
35	Transmission of shares on death	1072A
36	Transmission of shares on bankruptcy	1072B
37	Transmission of shares on mental incapacity	1072D
38	Registration of transfers	1072F
39	Additional general discretion for directors of proprietary companies to refuse to register transfers	1072G

(2) Legal operation of a company's corporate governance rules

Corporate governance rules as a statutory contract	s 140	As above

	CORPORATIONS ACT 2001 - SECT 1322 Irregularities	1) In this section, unless the contrary intention appears: a) a reference to a proceeding under this Act is a reference to any proceeding whether a legal proceeding or not; and b) a reference to a procedural irregularity includes a reference to: i) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation, at a joint meeting of creditors and members of a corporation or at a meeting of members of a registered scheme; and ii) a defect, irregularity or deficiency of notice or time. Note: This section applies in relation to CCIVs with modifications: see section 1242F. 2) A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid. 3) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated only because of the accidental omission to give notice of the meeting or the non - receipt by any person of notice of the meeting, unless the Court, on the application of the person concerned, a person entitled to attend the meeting or ASIC, declares proceedings at the meeting to be void. (3AA) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated only because of the inability of a person to access the notice of meeting, unless the Court, on the application of the person concerned, a person entitled to attend the meeting or ASIC, declares proceedings at the meeting to be void. Note: Under paragraph 249J(3)(c), a company may, in certain circumstances, give a member notice of a meeting by means of an electronic communication, or by giving the member sufficient information to allow the member to access the notice electronically. (3A) If members who are entitled to attend a meeting of members do not have, as a whole, a reasonable opportunity to participate in the meeting or in a proceeding at the meeting, the meeting or proceeding will only be invalid on that ground if: a) the Court is of the opinion that: i) a substantial injustice has been caused or may be caused; and ii) the injustice cannot be remedied by any order of the Court; and b) the Court declares the meeting or proceeding invalid. (3B) If voting rights are exercised in contravention of subsection 259D(3) (company controlling entity that holds shares in it), the meeting or the resolution on which the voting rights were exercised will only be invalid on that ground if: a) the court is of the opinion that: i) a substantial injustice has been caused or may be caused; and ii) the injustice cannot be remedied by any order of the court; and

Topic 6: Corporate Liability

(2) Authority to act for a company

(a) The power to bind a company to a contract Apparent or ostensible authority	***Freeman and Lockyer v Buckhurst Park Properties (Mangal) Co Ltd [1964] 2 QB 480*** **Elements of authority**	• Buckhurst Park Properties Ltd was a property development company • Mr. K, one of the four directors, hired architects (Freeman and Lockyer) without formal authorisation • The company refused to pay the architects, arguing Mr. K lacked authority to hire them. **Issue** • Whether Mr. K had apparent or ostensible authority to bind the company to the contract with the architects.	**Decision** • The court held that the company was liable to pay the architects as he had ostenisble authority. **Legal Principle** • The principle of apparent or ostensible authority was established. **If a principal represents that an agent has authority to act on its behalf, the principal is bound by the agent's actions,** even if the agent exceeds their actual authority. • Diplock LJ outlined four conditions for ostensible authority: 1. A representation is made to a third party that the agent has authority to act on behalf of the company. 2. The representation is made by someone with actual authority. 3. The third party is induced to enter into the contract based on that representation 4. The company's constitution did not prohibit such contracts or delegation of authority.
	Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising Co Pty Ltd (1976) 133 CLR 72; 50 ALJR 203 **Limits of authority**	• A former director who had resigned due to bankruptcy, continued to work for the company without formal authority. • Signed an order form on behalf of ADMA to purchase equipment from Crabtree-Vickers. • ADMA refused to honor the contract, arguing that Peter lacked authority to bind the company. **Issue** • Whether the company was bound by the contract made by the employee without actual authority.	**Decision** • The High Court of Australia held that the company was not bound by the contract as the employee did not have the authority. **Legal Principle** • The case affirmed the principles of apparent authority established in Freeman v Lockyer, but emphasised that the representation of authority must come from those who actually manage the company's affairs. Mere holding of a position is not sufficient to create apparent authority. • For ostensible authority to be established: 1. A representation must be made by the principal (the company) or someone with actual authority that the agent has authority to act on behalf of the company.