

WEEK 1: UNINCORPORATED ASSOCIATIONS, SOLE TRADERS & PARTNERSHIP (Chapter 1: Partnership)

Part A

- **Unit overview – read the unit outline**
- Forms of business organisations
- **Unincorporated Associations**
- The rules of an Association
- Intervention in internal management
- Contracts - capacity and effect
- Liability and specific area issues:
 - Tort
 - Gifts to unincorporated non profit associations
 - Dissolution.
- Gifts and bequests.
- Rights on dissolution
- *Associations Incorporation Act 1984 (NSW)*

Part B

The Law of Partnership

- Definition of Partnership
- Primary elements
 - Carrying on a business
 - “in common”
 - With a view to profit
- Further Indicia of Partnership
- Truth and Substance of the whole arrangement

Legislation:

- *Partnership Act 1892 (NSW)*
- *Corporations Act 2001 (Cth)*
- *Co-operatives Act 1992 (NSW)*
- *Associations Incorporation Act 1984 (NSW)*
- *Business Names Act 1962 (NSW)*

CH 1 PARTNERSHIP

- Simplest form of business association → most common
 - Requires no registration or other formality for its **conduct, formation or dissolution.**
- May be formed without parties being aware a partnership exists, (**no declaration**)

THE ORIGANS AND SOURCES OF PARTNERSHIP LAW

Modern forms lineal decents of 2 forms of business association:

- (1) Commenda: one party **supplies the capital for the venture but does not take an active role in its** management.
- (2) Societas: central form of English partnership law.
 - a. Common responsibilities and rights between partners, including **participation in profits, sharing losses and joining in the management of the business.**

Formed by court decision in middle ages, codification in *Partnership Act (UK)*.

- Focus on *Partnership Act 1892 (NSW)*

THE DEFINITION OF PARTNERSHIP

- **S1(1):** “the relation which exists between **persons carrying on business in common with a view of profit**”
- **S4:** Persons who have entered into partnership are **collectively a “firm” for the purposes of the Act and the name under which their business is carried is called the “firm name”- s4.**

The Definition of Partnership

(a) **Partnership as a relationship founded upon a business carried on in common**

- i.** Relationship founded upon agreements of the parties, **express or implied.**
 - ii.** Parties either **natural or corporate persons.**
 - iii.** Parties must be carrying on business in common: **s 45.**
 - i.** “business” includes every trade, occupation, or profession.
- “excludes the cases of an association formed for doing one particular act which is never to be repeated” – *Smith v Anderson (1880)*.
 - In *Ballantyne v Raphael (1889)*, where a syndicate was formed for the purpose of buying a block of land and subdividing it, the Supreme Court of Vic held that there was “not such a series of acts contemplated being done by the syndicate as means a carrying on of business”.
 - **Necessary that** each partner has the conduct of transactions, or be active in the business
 - **There can be a sleeping partner.**

(b) **The requirement of Profit**

- i.** There exists both **profitable and non profit club/ associations.**
 - i.** **Distinguish** between non for profit, engaging in profit making or revenue earning activities devoted to the purposes of the club or association.
 - 1.** There is no distribution of surplus to members unless perhaps upon the dissolution of the association.
 - ii.** *United Dominions Corporation v Brian Pty Ltd (1985):* ‘the important distinction between a partnership and a joint venture, is the distinction between an association of persons who engage in **common undertaking for profit and an association** of those who do so in order to generate a product to be **shared among the participants.**

(c) **Rules and indicia for determining the existence of partnership**

2 Rules for determining existence of partnership

(1) In determining whether a partnership does or does not exist, regard shall be had to the following rules:

Parties' characterisation of their relationship

- a. *Wiltshire v Kuenxil (1945)*: Roper J: argument that a partnership cannot be formed where the parties concur on saying that 'there shall not be a partnership between them':
- b. If the parties intended to do all the things which would constitute them parties, in law, no effect can be given to their declared intention not to become parties.
- c. So if their actions show otherwise – bad luck.

(1) Joint tenancy, tenancy in common, joint 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.

(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.

(3) **The receipt by a person of a share of the profits** of a business is prima facie evidence that the 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 the person a partner in the business; and in particular:

- *Common rule settled in Cox v Hickman (1860)*:
 - "it is often said that the test, or one of the tests, whether a person is not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is, **whether he is entitled to participate in the profits**. This, no, doubt is, in general, a sufficiently accurate test; *for a right to participate in profits affords cogent, often conclusive evidence, that the trade in which the profits have been made, was carried on in part for or on behalf of the person setting up such a claim.*"
- s 2(1)(3): lists specific instances where the receipt of a share of profits does not make itself the recipient of a partner:
 - Payment of a debt paid out of accruing profits of the partnership;
 - Remuneration of servants or agents by a share of the profits of the business;
 - Annuities to the widow or children of a deceased former partner paid from partnership profits;
 - The advance of money by way of loan to a person carrying on a business with interest varying with the profits or by a share of profits of the business provided that the contract is in writing and signed by the parties; and
 - Receipt of a portion of profits in consideration of the sale of goodwill of a business.

(a) **The receipt by a person of a debt or other liquidated demand by instalments or otherwise** out of the accruing profits of a business does not of itself make the person a partner in the business or liable as such:

(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:

(c) A person being the widow, widower 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:

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

(2) This section does not apply to or in respect of an incorporated limited partnership.

- **S 2(1)** has specific rules to what determines an existence of partnership.
- **Sharing net profits:**
 - **Prima facie evidence of partnership: s 2(1)(3):**
 - The receipt by a person of a share of the profits is prima facie evidence that he is a partner in the business but 'does not of itself' make him or her a partner in the business.
 - There are other factors which cannot be ignored!
 - **s (2)(2): the sharing of gross returns does not itself characterise a partnership, whether there is joint/common interest in property (from which returns are derived).**
- **Sharing of losses:**
 - **S 24(1)(1):** sharing of losses/profits characteristic of partnership.
 - **Equal contribution**
- **Status of Principal:**
 - Those acting in the partnership do **so as agents of all the partners, who are the principals, even if 'dormant or 'sleeping':**
 - "this principle applies not only to persons acting openly and avowedly as partners, **but to others who, though not so acting, are by secret or private agreement, partners with those who appear ostensibly to the world as the persons carrying on the business**"
 - **S 14:** Provides for the liability of persons who allowed themselves to be **held out as partners** of a firm even though **they are not partners.**
- **Management Participation:**
 - Influential in indicating existence of a partnership:
 - Treated in the internal management of the business
 - Participate in its control or management decision
 - Are held out by others to be significant.
 - Participation is not essential → there may be dormant or sleeping partners who **remain as principals in relation to external dealings, but they** take no part in the management of the partnership.
- **Mutual Trust and Confidence:**
 - Important feature between partners
 - 'life blood of the concern': *Bitchnell Case (1929)*
 - Fiduciary obligation flows from it, in the partnership agreement
 - Not strictly required for finding of partnership.
- **Contribution to capital:**
 - Not strictly essential
 - Common to find no capital contribution by a partner, only an **agreement.**
 - **S 2(1): joint or part ownership of property does not itself create a partnership, as to anything so owned whether profits made by its use are shared or**

Re Megevand; Ex parte Delhasse (1878) – Court of Appeal, England and Wales

(Where it is stated that there is no partnership, this is irrelevant as it is necessary to look at the facts to determine whether a partnership exists)

Facts:

- Delhasse (D) agreed to advance a sum to M and S who were partners by a written agreement

Badeley v Consolidated Bank (1888) – Court of Appeal, England and Wales

(No partnership, just lenders)

Facts:

The Plaintiff (Badeley) **advanced money to a railway construction contractor** (Smith). By deed the contractor assigned to the plaintiff his plant machinery and other items as security for the advance. The plaintiff was to receive 10% interest and 10% of the profits after allowance for some drawings by the contractor. The contractor covenanted to apply the moneys advanced in the carrying out of the work. the plaintiff could enter and complete them if the contractor became bankrupt.

Lindley LJ:

- I take it that it is quite plain now, ever since *Cox v Hickman (1860)* that what we have to get at is **the real agreement between the parties. It is no longer right to infer either partnership or agency from the mere fact that one person shares the profits of another.**
- When you do look at the whole of the evidence it appears to me that the formal document **expresses the real truth, namely, that this was a contract of loan upon security.**
- It appears to me that when you look at the transaction with a view to ascertain the real, true nature of it you are driven to the conclusion **that it was a bona fide loan upon security, and not a participation in profits with a view to create a partnership wither secrete or open.**

Partnership not recognised:

- The firm and its members collectively **are not endowed** with a distinct entity status: with any capacity of acquiring rights or obligations independent of those of the individual partners.
 - Individual members may be personally liable in acts done.
- **Absence of a separate legal status for the firm has legal consequences:**
 - As partner, a principal of firm, cannot **also be employed of that firm.**
 - **Duration determined by s 26, 32-34: which are subject to any special agreement made by the partners**
 - A partnership **cannot own property:** see s 20.

Partnerships bear unlimited liability incurred by the partnership:

- Each partner has unlimited liability to the creditors of the partnership expressed in some older cases as 'last shilling and acre'
 - Rule not affected by **any agreement between the partners**, even though there is different proportions or may even indemnify some partners against personal liability.

Agency authority to bind fellow partners:

- **The common law scope** of the liability of **partners for debts and obligations** of those who conduct the partnership business was noted in the House of Lords decision in Cox v Hickman (1860).
- **Agency authority stated in s 5 and complemented by provisions relating to firms contracts and instruments, (ss6-9, 14-18), civil wrongs (ss 10-12) and the improper use of trust property for partnership purposes: s13.**
 - **S 5: power of a partner to bind the firm, and consequent scope of partner liability for firm debts.**
 - The common law of agency distinguishes between **two main grounds of liability** of principal **with respect to the dealings by an agent with an outsider.**
 - Where the agent has **actual authority from the principal:**
 - involves an agency created by a consensual agreement between principal and agent, the scope of which includes any proper implications from the words used, usages of the trade or the course of dealings between the principal and agent.
 - Actual authority is either:
 - **Express:** Express authority may be stated explicitly, orally or in writing.
 - **Implied:** Implied actual authority may be inferred from the usual or customary authority involved in the relationship between principal and agent, or as incidental to express authority, but it may also arise from the special features of the relationship, or from an actual course of dealing between the parties which establishes an actual authority outside what is usual.
 - S5(1) of the Partnership Act 1892 (NSW) restates the scope of actual authority of a partner when it says that every partner is an agent of the firm. This section imposes no liability on partners for acts done by a partner who is acting, and is dealt with as acting, on their own behalf only, and not on behalf of the firm.
 - Where the agent has **ostensible (apparent) authority.**

Limited partnerships allow for limitation of the liability of some partners:

- Creation of 2 classes partner:
 - General → have an **unfettered control over the conduct of the partnership business**.
 - Limited → contribute to capital and share profit, but **have no right to participate in the management of the partnership**.
 - If they do engage in management of the business, they assume liability under **s 67**.
 - **Registration is required and is a condition of the limitation on liability**.
 - A statement setting out details of the limited partnership is required including the firm's name, address, the identity of the individual partners, their character as either general or limited partners, whether the firm is a limited partnership, and the limit of the liability of each limited partner to contribute to the firm's debts and obligations: **s54**.
 - The register of limited partnerships **is available for public inspection :s57**.
 - Limited partnership must be identified in any document issued by the partner by the words "A Limited Partnership" immediately adjacent to its firm's name: **s75**.

Other characteristics of Partnership:

- The contract is of **personal nature**.
 - No person may be introduced as a partner without **all the consent of the existing partners pursuant to s 24(1)(7)**:
 - **If a partner dies, the deceaseds representatives or heirs** have the right to become partners, in the absence of a contrary agreement.