An Outline of the Law of Partnership

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Stephen Graw

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An Outline of the Law of Partnership

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Dedicated to

My parents, Bruce and Connie,
in grateful acknowledgment
of their lifelong support
and encouragement.

Preface

The law does not stand still and while the rules governing partnerships are more set, and therefore more stable than in a number of other areas of the law, there have been a number of significant changes since the last edition of this book (published in 2007). Those changes have been the result of both new and amended legislation and court decisions which continue to shape and explain how the law operates.

This edition incorporates all of those changes and also expands the already existing coverage a little by including additional explanations and case examples to illustrate how those rules apply in practice.

The major legislative changes covered include those in Tasmania (a new Part 3 has been inserted into the *Partnership Act 1891* (Tas) to replace the *Limited Partnerships Act 1908* and to allow for the establishment of incorporated limited partnerships in that State), in Western Australia (where there have been many changes to the numbering of its sections), in Victoria (which has introduced a new *Equal Opportunity Act 2010*, intended to take effect from August 2011), and in New Zealand (which repealed the provisions of its *Partnership Act* relating to 'special partnerships', and introduced a new *Limited Partnerships Act 2008* to provide for 'limited partnerships' that are roughly equivalent to Australia's incorporated limited partnerships).

Major new cases covered include *Friend v Brooker* (dealing with the consequences of making a commercial decision to operate under a particular organisational form); *Spriggs v FCT* (further definition of what can constitute a business); *Atwell v Roberts (No 3)* (outsize partnerships); *Seiwa Australia Pty Ltd v Beard* (the liability of a firm for actions of a partner not carried out 'in the usual way'); *McNally v Harris* (holding out); *Lawfund Australia Pty Ltd v Lawfund Leasing Pty Ltd* (competing with one's own firm); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (the effect of disclosure on breach of fiduciary duty); *Cavasinni v Cavasinni* (costs of dissolution and interest paid on capital contributions); *Trinkler v Beale* (buying out partners on a dissolution); *Walker v*

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Melham (the rights of departing partners to choose between a share of profits or interest where there is a delay in paying them out); *Old v Hodgkinson* (premiums); *Yard v Yardoo Pty Ltd* (appointment of receivers); *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd (No 9)* (the relationship between partners' contractual and fiduciary obligations); *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (onus of proof in actions for an account) and *Maclag (No 11) Pty Ltd v Chantay Too Pty Ltd* (considerations to be taken into account on an expulsion).

Like its predecessors, this edition has been written principally for students. This text recognises that, in most cases, partnership forms only part of a larger subject dealing more generally with the law governing business entities. For that reason, it seeks to explain and illustrate the law of partnership, as it operates in Australia and New Zealand, as simply, concisely and understandably as possible, with an emphasis on broad principle rather than comprehensive detail.

The finished product of course owes a lot to many people and I would like to express my appreciation especially to those whose feedback on earlier editions have shaped many of the changes. I would also like to thank Natasha Naude and Lara Weeks from Thomson Reuters for shepherding the typescript through to its published form and, most importantly, my wife Dale who has once again assisted throughout in the preparation of this edition, researching and updating material and providing advice and assistance. Any remaining errors are, of course, all my own work. The law as stated is as I understand it to be on 2 May 2011.

STEPHEN GRAW

Townsville
July 2011

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s 14(3): 4.560
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s 29: 6.470, 7.60
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s 46: 7.200, 9.260, 9.280
s 47: 9.250
s 48: 5.140, 5.260, 7.20, 9.590
s 48(a): 6.80, 9.630
s 48(b): 6.170, 9.600
s 49: 10.50, 10.70
s 49(3): 4.130, 4.190, 4.810, 4.820, 9.30, 10.20, 11.40
s 50(1): 10.50
s 51: 10.20
s 52: 10.30
s 54(1): 10.40
s 54(2): 10.40
s 54(2)(g): 10.60
s 56: 10.90
s 56(4): 10.50
s 58: 10.40
s 58(4): 10.40
s 59: 10.40
s 60: 10.20, 10.50
s 61: 10.50
s 62(1): 10.50
s 64A: 10.20
s 65: 10.50, 10.70
s 67(1): 10.20
s 67(2): 10.70
s 67(3): 10.20, 10.70
s 67(4): 10.70, 10.80
s 67(5): 10.80
s 68(1): 10.80

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s 69(1): 10.80
s 69(2): 10.80
s 70: 10.20
s 70(1)(a): 8.100, 10.80
s 70(1)(b): 10.80
s 70(1)(c): 10.100
s 70(2): 10.100
s 71: 10.70
s 73: 10.100
s 75(2): 10.70
s 75(3): 10.70
s 81: 11.10, 11.200
s 82: 4.20, 4.40, 4.120, 4.130, 4.180, 4.190, 4.390, 4.510, 4.670, 4.760, 4.780, 4.810, 4.820, 6.10, 6.330, 6.480, 6.530, 7.190, 11.100, 11.150
s 82(1): 5.350, 6.640, 8.20, 8.80, 8.100, 9.30, 11.100, 11.140
s 82(2): 11.100
s 84: 11.70
s 85(1): 11.60
s 85(2): 11.60
s 85(3): 11.60
s 86: 11.130
s 87(1): 11.50
s 87(2): 11.60
s 88: 11.50
s 95: 11.120
s 96: 11.140
s 96(7): 11.160
s 97: 11.150
s 98(1): 11.170
s 98(2): 11.170
s 98(3): 11.170
s 98(4): 11.170
s 98(5): 11.180
ss 103 to 105: 11.40
s 106: 11.200
s 107(1): 11.200
ss 107(2) to (4): 11.200
s 108(1): 11.210
s 108(2): 11.210
s 110: 11.210
s 111: 11.210
s 112(1): 11.220
s 114: 11.230
s 116: 11.90
s 117: 11.90
s 118: 11.80
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Pt 5: 11.10
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r 17.01: 3.70, 4.460
r 17.01(1): 3.70

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s 5: 3.240
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s 14: 5.260, 8.140
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s 13: 9.250
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s 6(5)(e): 8.100
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s 3: 1.70
s 4: 1.60, 1.230
s 4(1): 10.70
s 4(2): 10.20, 10.50, 10.60

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s 4(3): 10.50, 10.70
s 5: 10.30
s 6: 1.20
s 6(1): 10.20, 10.70, 10.80
s 6(2): 10.20, 10.100
s 6(3): 10.100
s 6(4): 10.100
s 6(4A): 10.100
s 6(5): 10.20
s 6(5)(a): 10.80
s 6(5)(b): 10.80
s 6(5)(c): 10.80
s 6(5)(d): 10.80
s 6(5)(e): 10.80
s 7: 2.70, 10.20, 11.40
s 7(1): 1.60
s 8: 10.40
s 8(1A): 2.40
s 8(1A)(1): 2.50, 5.330
s 8(1A)(2): 2.80
s 8(1A)(3): 2.120
s 8(1A)(4): 2.140
s 8(1A)(5): 2.180
s 8(1A)(6): 2.210
s 8(1A)(7): 2.230
s 8(1A)(8): 2.280
s 9: 2.310, 10.90
s 9(1)(e): 10.70
s 9(1)(g): 10.50, 10.60
s 10: 3.30, 10.50
s 13: 10.40
s 13(1): 3.40, 4.180
s 13(2): 3.40
s 14: 4.120, 5.350
s 15: 4.40, 6.240
s 16: 3.60, 4.390, 5.260, 9.580
s 16(2): 10.40
ss 16 to 19: 9.500
s 17(1): 4.510
s 17(2): 4.560
ss 17 to 20: 4.510
s 18: 4.670
s 18(1): 4.760
s 19: 4.510
s 20(1): 4.780
s 21(1): 4.190
s 21(2): 4.370
s 22(1): 4.130, 4.810
s 22(2): 4.130
s 23: 4.820
s 24(1): 9.30
s 24(2): 7.190, 9.30
s 24(3): 7.190, 9.30
s 25: 9.140
s 26: 1.50, 2.70, 4.20, 6.120, 6.390
s 27: 4.160
s 28: 5.260, 5.350, 8.140
s 28(2): 8.140
s 29: 4.40, 5.90, 6.10
s 30(1): 5.120
s 30(3): 5.330
s 31: 5.270
s 32: 5.350
s 33: 5.120
s 34(1A): 5.260, 6.10
s 34(1A)(1): 2.70, 6.20, 9.310
s 34(1A)(2): 4.650, 6.120, 6.170
s 34(1A)(3): 6.160, 6.170
s 34(1A)(4): 6.210
s 34(1A)(5): 6.230, 6.250
s 34(1A)(6): 2.70, 6.290
s 34(1A)(7): 6.400
s 34(1A)(7A): 6.400
s 34(1A)(7B): 6.400
s 34(1A)(8): 6.430, 6.480
s 34(1A)(9): 6.400
s 35(1): 6.470, 7.60
s 35(2): 7.80, 7.140
s 36: 8.90
s 37(1): 8.100
s 37(2): 8.120
s 38: 8.80
s 39: 6.480
ss 39 to 41: 5.40
s 40: 6.530
s 41: 6.640
s 42(1): 6.330
s 42(2): 6.350
s 43: 8.80
s 43(c): 8.100
ss 43 to 45: 8.40
s 44: 8.130
s 44(1): 3.290, 7.30, 8.130
s 44(2): 5.350, 8.130, 8.140
s 44(3): 5.350, 7.30, 8.140
s 44(4): 5.350, 8.140
s 45: 8.40

Partnership Act 1895 — *cont*
s 46: 8.150
s 46(a): 3.280, 8.160
s 46(b): 8.170
s 46(c): 8.180
s 46(d): 8.200
s 46(e): 8.150
s 46(f): 8.210
s 46(g): 8.240
s 47: 9.40
s 48: 9.120
s 49: 6.580, 9.260, 9.530
s 50: 6.580, 9.580
s 51: 5.340
s 53: 9.460
s 54: 8.250, 9.500
s 55: 7.200
s 55(1): 9.260
s 55(2): 9.280
s 55(3): 9.400
s 56: 9.250
s 57: 5.140, 5.260, 7.20, 9.590
s 57(2): 6.80, 9.630
s 57(3): 6.170, 9.600
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O 71, r 1: 3.70, 4.460

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s 4(1): 3.240
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s 456: 1.230, 3.100
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s 16: 3.300
s 241(4)(d): 8.240
Pt 15A: 11.280
Pt 16: 11.260
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Flags, Emblems, and Names Protection Act 1981: 3.50
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r 4.25: 3.70, 4.460
Human Rights Act 1993
s 21: 3.310
s 36: 3.310
Illegal Contracts Act 1970: 3.160
s 6(1): 3.160
s 7: 3.160
s 7(3): 3.160
s 7(4): 3.160
Income Tax Act 2007: 1.160
s YA 1: 1.160
Insolvency Act 2006: 2.310
s 55: 8.130
s 56: 8.130
s 136: 5.260
s 137: 5.260
s 149(1)(a): 3.290
s 280: 2.310
s 280(2): 2.310
Pt 3(10): 2.310
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r 47: 3.70
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s 94: 4.460
Lawyers and Conveyancers Act 2006: 3.140
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s 4: 9.250
Limited Partnerships Act 2008: 4.120, 4.130, 4.670, 4.760, 4.780, 4.810, 7.190, 8.20, 10.10, 11.240
s 3: 11.240
s 4: 11.290
s 6: 11.240
s 7: 11.250
s 8(1): 11.240
s 8(2): 11.240
ss 9 to 10: 11.240
s 10: 11.250
s 11: 11.240
ss 12 to 13: 11.240
s 15: 4.180, 4.190
s 15(2): 4.40
s 18: 11.240
s 19: 11.240
s 20: 11.240
s 23: 11.240
s 24: 11.240
s 26: 4.390, 11.240
s 27: 4.510, 11.240
s 29: 11.240

Limited Partnerships Act 2008 — *cont*
s 30: 11.240
s 31: 11.240
s 31(3): 11.240
s 32: 11.240
s 33: 11.240
s 34: 11.250
s 46: 11.240
s 47: 4.810, 11.240
s 48: 4.820
s 49: 6.480, 6.530, 6.640, 11.240
s 50: 11.240
s 52: 11.250
s 53: 11.250
s 54(1)(a): 11.250
s 54(1)(b): 11.290
s 58: 11.250
s 59: 11.250
s 61: 11.250
s 86: 11.260
ss 86 to 99: 8.20
s 88: 11.260
s 89: 11.260, 11.270
s 90: 11.260
s 92: 11.260
s 95: 11.260
ss 96 to 97: 11.270
s 98(2)(a): 11.270
s 98(2)(b): 11.270
s 98(3): 11.270
s 98(4): 11.270
s 100: 11.280
s 103: 11.290
s 107: 11.290
s 108: 11.290
s 113: 11.290
s 113(2)(b): 11.290
s 114: 11.290
s 122: 10.10
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s 6: 3.260
s 6(1): 3.260
s 6(2): 3.260
s 6(3): 3.260
s 9: 3.260
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s 2: 1.70
s 3: 1.20
s 4: 2.70
s 4(1): 1.60, 1.160
s 4(2): 1.60, 1.230
s 5: 2.40
s 5(a): 2.50, 5.330
s 5(b): 2.80
s 5(c): 2.120
s 5(c)(i): 2.140
s 5(c)(ii): 2.180
s 5(c)(iii): 2.210
s 5(c)(iv): 2.230
s 5(c)(v): 2.280
s 6: 2.310
s 7: 3.30
s 8: 1.50, 2.70, 4.20, 6.120, 6.390
s 9: 3.40, 4.180
s 10: 4.120
s 11: 4.40, 6.240
s 12: 3.60, 4.390, 5.260, 9.580
ss 12 to 15: 9.500
s 13: 4.510
ss 13 to 16: 4.510
s 14: 4.670
s 14(b): 4.760
s 15: 4.510
s 16: 4.780
s 17(1): 4.190
s 17(2): 4.370
s 18: 4.130, 4.810

Partnership Act 1908 — *cont*
s 19: 4.820
s 20(1): 9.30
s 20(2): 7.190, 9.30
s 20(3): 7.190, 9.30
s 21: 9.140
s 22: 4.40, 5.90, 6.10
s 23(1): 5.120
s 23(3): 5.330
s 24: 5.270
s 25: 5.350
ss 25 to 26: 5.350
s 26: 5.260, 5.350, 7.190
s 26(2): 5.350, 8.140
s 26(2A): 5.350, 8.140
s 27: 5.260, 6.10, 7.190
s 27(a): 2.70, 6.20, 9.310
s 27(b): 4.650, 6.120, 6.170
s 27(c): 6.160, 6.170
s 27(d): 6.210
s 27(e): 6.230
s 27(f): 6.250
s 27(g): 2.70, 6.290
s 27(h): 6.400
s 27(i): 6.430, 6.480
s 28: 6.470, 7.60
s 29(1): 8.100
s 29(2): 8.120
s 30: 8.80
s 31: 6.480
ss 31 to 33: 5.40
s 32: 6.530
s 33: 6.640
s 34(1): 6.330
s 34(2): 6.350
s 35: 8.80
s 35(1)(c): 8.100
s 35(2): 8.100
ss 35 to 37: 8.40
s 36: 8.130
s 36(1): 3.290, 7.30, 8.130
s 36(2): 5.350, 8.140
s 37: 8.40
s 38: 8.150
s 38(a): 3.280, 8.160
s 38(b): 8.170
s 38(c): 8.180
s 38(d): 8.200
s 38(e): 8.210
s 38(f): 8.240
s 39: 9.40
s 40: 9.120
s 41: 6.580, 9.260, 9.530
s 42: 6.580, 9.580
s 43: 9.460
s 44: 8.250, 9.500
s 45: 7.200
s 45(1): 9.260
s 45(2): 9.280
s 46: 9.250
s 47: 4.20, 5.140, 5.260, 7.20, 9.590
s 47(a): 6.80, 9.630
s 47(b): 6.170, 9.600
s 57: 10.10

United Kingdom

Companies Act 1862
s 4: 1.100, 3.130
Partnership Act 1890: 1.20
Solicitors Act 1957: 8.50
Trade Descriptions Act 1968: 4.620

Comparative Table – Partnership Acts

NSW	VIC	SA	Qld	WA	Tas	ACT	NT	NZ
s 1A	s 1	s 1A	s 1	s 1	s 1	s 1	s 1	s 1(1)
s 1B	s 3	s 1B	Sched	s 3	s 4	Dict.	s 3	s 2
s 1C	s 82	s 1C	s 5A(2)	-	-	s 5(2)	s 4(2)	-
s 1	s 5	s 1	s 5	ss 4, 7	s 6	s 6	s 5	s 4
(1)	(1)	(1)	(1)	s 7(1)	(1)	(1)	(1)	(1)
(2)	(2)	(2)	(2)	s 4	(2)	(2)	(2)	(2)
-	-	-	-	s 7(2)	-	-	-	-
s 2(1)	s 6	s 2(1)	s 6(1)	s 8(1A)	s 7	s 7(1)	s 6(1)	s 5
(1)	(1)	(a)	(a)	(1)	(a)	s 7(2)	(a)	(a)
(2)	(2)	(b)	(b)	(2)	(b)	s 7(3)	(b)	(b)
(3)	(3)	(c)	(c)	(3)	(c)	s 7(4)	(c)	(c)
(a)	(a)	(i)	(i)	(4)	(i)	(a)	(i)	(i)
(b)	(b)	(ii)	(ii)	(5)	(ii)	(b)	(ii)	(ii)
(c)	(c)	(iii)	(iii)	(6)	(iii)	(c)	(iii)	(iii)
(d)	(d)	(iv)	(iv), (2)	(7)	(iv)	(d)	(iv), (2)	(iv)
(e)	(e)	(v)	(v)	(8)	(v)	(e)	(v)	(v)
s 2(2)	-	s 2(2)	s 6(3)	-	-	s 7(5)	-	-
s 3	s 7	s 3	s 7	s 9	s 8	-	s 7	s 6
s 4	s 8	s 4	s 4(1)	s 10	s 9	Dict.	s 8	s 7
-	-	-	-	s 11	-	-	-	-
-	-	-	-	s 12	-	-	-	-
s 5	s 9	s 5	s 8	s 26	s 10	s 9	s 9	s 8
(1)	-	(1)	(1)	-	(1), (2)	(1), (2)	(1), (2)	-
(2)	ss 49(3), 82	(2)	(2)	-	(3), (4)	(3), (4)	(3), (4)	s 47

NSW	VIC	SA	Qld	WA	Tas	ACT	NT	NZ
s 6	s 10	s 6	s 9	s13	s 11	s 10	s 10	s 9
(1)	-	(1)	(1)	(1)	(1)	(1)	(1)	-
(2)	-	(2)	(2)	-	(2)	(2)	(2)	-
(3)	-	(3)	(3)	(2)	(3)	(3)	(3)	-
s 7	s 11	s 7	s 10	s 14	s 12	s 11	s 11	s 10
(1)	-	(1)	(1), (3)	-	(1), (3)	(1), (2)	(1), (3)	-
(2)	-	(2)	(2), (3)	-	(2), (3)	(3), (4)	(2), (3)	-
s 8	s 12	s 8	s 11	s 15	s 13	s 12	s 12	s 11
(1)	-	(1)	(1)	-	(1)	(1)	-	-
(2)	-	(2)	(2)	-	(2)	(2)	-	-
s 9	s 13	s 9	s 12	s 16	s 14	s 13	s 13	s 12
(1)	-	(1)	(1)	-	(1)	(1), (2)	(1), (3)	-
(2)	-	(2)	(2)	-	(2)	(3), (4)	(2), (3)	-
(3)	-	(3)	(3)	-	(3)	(5)	(4)	-
s 10	s 14	s 10	s 13	s 17	s 15	s 14	s 14	s 13
(1)	(1)	(1)	(1)	(1)	(1)	(1), (2)	(1)	-
(2)	(2)	(2)	(2)	(2)	(2)	(3)	(3)	-
						s 14A		
(3)	(1)	(3)	(3)	-	-	(1), (2)	(2)	-
(4)	(2)	(4)	(4)	-	(3)	(3)	(3)	-
-	-	(5)	-	-	(4)	-	(3)	-
s 11	s 15	s 11	s 14	s 18	s 16	s 15	s 15	s 14
(1)1	-	(1)	(1)	-	(1)	(1)	(1)	-
(a)	(a)	(a)	(a)	(1)	(a)	(a)	(a)	(a)
(b)	(b)	(b)	(b)	(1)	(b)	(b)	(b)	(b)
(2)	-	(2)	(2)	-	(2)	(2)	(2)	-
(a)	(a)	(a)	(a)	-	(a)	(a)	(a)	-
(b)	(b)	(b)	(b)	-	(b)	(b)	(b)	-
-	-	-	-	(2)	-	-	-	-
-	-	-	-	-	-	(3)	(3)	-
s 12	s 16	s 12	s 15	s 19	s 17	s 16	s 16	s 15
(1)	-	(1)	(1)	-	(1)	(1)	(1)	-
(2)	-	(2)	(2)	-	(2)	(2)	(2)	-
(3)	-	(3)	(3)	-	(3)	(3)	(3)	-

NSW	VIC	SA	Qld	WA	Tas	ACT	NT	NZ
s 13	s 17	s 13	s 16	s 20	s 18	s 17	s 17	s 16
(1)	-	(1), (1a)	(1), (2)	-	(1),(2), (3)	(1), (2)	(1), (3)	-
-	-	-	-	-	-	s 17A	-	-
(2)	-	(2)	(3)	-	(2)	(1)	(2)	-
(3)	-	(3)	(4)	-	(3), (4)	(2)	(3)	-
s 14	s 18	s 14	s 17	s 21	s 19	s 18	s 18	s 17
(1)	(1)	(1)	(1)	(1)	(1)	(1), (2)	(1), (3)	(1)
(1A)	(1)	(1a)	(2)	-	(2)	(3), (4)	(2), (3)	-
(2)	(2)	(2)	(3)	(2)	(3)	(5)	(4)	(2)
s 15	s 19	s 15	s 18	s 22	s 20	s 19	s 19	s 18
(1)	-	(1)	(1)	(1)	(1)	(1)	(1)(a)	-
(2)	-	(2)	(2)	-	(2)	(2)	(1)(b)	-
-	-	-	-	-	-	-	(2)	-
-	-	-	-	(2)	-	-	-	-
s 16	s 20	s 16	s 19	s 23	s 21	s 20	s 20	s 19
(1)	-	(1)	(1)	-	(1)	(1)	(1)	-
(2)	-	(2)	(2)	-	(2)	(2)	(2)	-
s 17	s 21	s 17	s 20	s 24	s 22	s 21	s 21	s 20
(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)
(2)	(1)	(2)	(2)	-	(2)	(2)	(3)	-
(3)	(2)	(3)	(3)	(2)	(3)	(3)	(2)	(2)
(4)	(2)	(4)	(4)	-	(4)	(4)	(4)	-
(5)	(3)	(5)	(5)	(3)	(5)	(5)	(5), (6)	(3)
(6)	(3)	(6)	(6)	-	(6)	(6)	(5), (6)	-
-	-	-	-	-	-	(7)	-	-
s 18	s 22	s 18	s 21	s 25	s 23	s 22	s 22	s 21
(1)	-	(1)	(1)	-	(1)	(1)	(1)	-
(2)	s 82(1)	(2)	(2)	-	(2)	(2)	(2)	-
-	-	-	-	s 27	-	-	-	-
-	-	-	-	s 28	-	-	-	-
s 19	s 23	s 19	s 22	s 29	s 24	s 23	s 23(1), (2)	s 22
s 20	s 24	s 20	s 23	s 30	s 25	s 24	s 24	s 23
(1)	(1)	(1)	(1)	(1)	(1)	(1), (2)	(1), (2)	(1)

NSW	VIC	SA	Qld	WA	Tas	ACT	NT	NZ
(2)	(2)	(2)	(2)	(2)	(2)	(2)	(3)	(2)
(3)	(3)	(3)	(3)	(3)	(3)	s 25(1)	(4)	(3)
(4)	-	(4)	(4)	-	(4)	ss 24(4) & 25(2)	-	-
s 20A	-	s 20A	s 23A	-	s 25A	s 24A	s 24	-
(1)	-	(1)	(1)	-	(1)	(1), (2)	(5)	-
(2)	-	(2)	(2)	-	(2)	(3)	(6)	-
s 21	s 25	s 21	s 24	s 31	s 26	s 26	s 25	s 24
s 22	s 26	s 22	s 25	s 32	s 27	s27	s 26	s 25
(1)	-	(1)	(1)	-	(1)	(1)	(1)	-
(2)	s 82(1)	(2)	(2)	-	(2)	(2)	(2)	-
-	-	-	-	s 33	-	-	-	-
s 23	s 27	s 23	s 26	-	s 28	-	s 27	s 26
(1)	(1)	(1)	(1)	-	(1)	-	(1)	(1)
(2)	(2)	(2)	(2)	-	(2)	-	(2)	(2)
-	-	-	-	-	-	-	-	(2A)
(3)	(3)	(3)	(3)	-	(3)	-	(3)	(3)
(4)	s 82(1)	(4)	(4)	-	(4)	-	(4)	-
-	-	-	-	-	-	-	-	-
s 24(1)	s 28	s 24(1)	s 27(1)	s 34(1A)	s 29(1)	s 29(10)	s 28(1)	s 27
(1)	(1)	(a)	(a)	(1)	(a)	(1)	(a)	(a)
(2)	(2)	(b)	(b)	(2)	(b)	(2)	(b)	(b)
(3)	(3)	(c)	(c)	(3)	(c)	(3)	(c)	(c)
(4)	(4)	(d)	(d)	(4)	(d)	(4)	(d)	(d)
(5)	(5)	(e)	(e)	(5)	(e)	(5)	(e)	(e)
(6)	(6)	(f)	(f)	(5)	(f)	(6)	(f)	(f)
(7)	(7)	(g)	(g)	(6)	(g)	(7)	(g)	(g)
(8)	(8)	(h)	(h)	(7), (7A), (7B), (9)	(h)	(8)	(h)	(h)
(9)	(9)	(i)	(i)	(8)	(i)	(9)	(j)	(i)
s 24(2)	-	s 24(2)	s 27(2)	-	s 29(2)	(11)	s 28(2)	-
s 25	s 29	s 25	s 28	s 35(1)	s 30	s 30	s 29	s 28

NSW	VIC	SA	Qld	WA	Tas	ACT	NT	NZ
-	-	-	-	s 35(2)	-	-	-	-
-	-	-	-	s 36	-	-	-	-
s 26	s 30	s 26	s 29	s 37	s 31	s 31	s 30	s 29
(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)
(2)	(2)	(2)	(2)	(2)	(2)	-	(2)	(2)
(3)	s 82(1)	(3)	(3)	-	(3)	(2)	(3)	-
s 27	s 31	s 27	s 30	s 38	s 32	s 32	s 31	s 30
(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)
(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)
(3)	s 82(1)	(3)	(3)	-	(3)	(3)	(3)	-
s 28	s 32	s 28	s 31	s 39	s 33	s 33	s 32	s 31
(1)	-	(1)	(1)	-	(1)	(1)	(1)	-
(2)	-	(2)	(2)	-	(2)	(2)	(2)	-
s 29	s 33	s 29	s 32	s 40	s 34	s 34	s 33	s 32
(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)
(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)
(3)	-	(3)	(3)	-	(3)	(3)	(3)	-
s 30	s 34	s 30	s 33	s 41	s 35	s 35	s 34	s 33
(1)	-	(1)	(1)	-	(1)	(1)	(1)	-
(2)	s 82(1)	(2)	(2)	-	(2)	(2)	(2)	-
s 31	s 35	s 31	s 34	s 42	s 36	s 36	s 35	s 34
(1)	(1)	(1)	(1)	(1)	(1)	(1), (2)	(1), (2)	(1)
(2)	(2)	(2)	(2)	(2)	(2)	(3)	(3)	(2)
(3)	-	(3)	(3)	-	(3)	(4)	(4)	-
s 31A	s 82(1)	s 31A	s 34A	-	s 36A	s 36A	35A	-
s 32	s 36	s 32	s 35	s 43	s 37	s 37	s 36	s 35
(a)	(a)	(a)	(1)(a)	(a)	(a)	(1)(a)	(1)(a)	(1)(a)
(b)	(b)	(b)	(1)(b)	(b)	(b)	(1)(b)	(1)(b)	(1)(b)
(c)	(c)	(c)	(1)(c), (2)	(c)	(c)	(1)(c), (2)	(1)(c), (2)	(1)(c), (2)
s 33	s 37	s 33	s 36	s 44	s 38	s 38	s 37	s 36
(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)

NSW	VIC	SA	Qld	WA	Tas	ACT	NT	NZ
(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)
-	-	-	-	(3)	-	-	-	-
-	-	-	-	(4)	-	-	-	-
s 34	s 38	s 34	s 37	s 45	s 39	s 39	s 38	s 37
s 35	s 39	s 35	s 38	s 46	s 40	s 40	s 39	s 38
(a)	(a)	(a)	(a)	(a)	Omit-ted	(1)(a), (2)	(1)(a), (2)	(a)
(b)	(b)	(b)	(b)	(b)	(b)	(1)(b), (3)	(1)(b)	(b)
(c)	(c)	(c)	(c)	(c)	(c)	(1)(c), (3)	(1)(c)	(c)
(d)	(d)	(d)	(d)	(d)	(d)	(1)(d), (3)	(1)(d)	(d)
(e)	(e)	(e)	(e)	(f)	(e)	(1)(e)	(1)(e)	(e)
(f)	(f)	(f)	(f)	(g)	(f)	(1)(f)	(1)(f)	(f)
-	-	-	-	(e)	-	-	-	-
-	-	-	-	-	-	(4)	-	-
s 36	s 40	s 36	s 39	s 47	s 41	s 41, 43	s 40	s 39
(1)	(1)	(1)	(1)	(1)	(1)	s 41(1)	(1)	(1)
(2)	(2)	(2)	(2)	(2)	(2)	s 43	(2)	(2)
(3)	(3)	(3)	(3)	(3)	(3)	s 41(2), (3)	(3), (4)	(3)
s 37	s 41	s 37	s 40	s 48	s 42	s 42	s 41	s 40
s 38	s 42	s 38	s 41	s 49	s 43	s 44	s 42	s 41
s 39	s 43	s 39	s 42	s 50	s 44	s 45	s 43	s 42
-	-	-	-	s 51	-	-	-	-
-	-	-	-	s 52	-	-	-	-
s 40	s 44	s 40	s 43	s 53	s 45	s 46	s 44	s 43
(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)
(b)	(b)	(b)	(b)	(b)	(b)	(b)	(b)	(b)
s 41	s 45	s 41	s 44	s 54	s 46	s 47	s 45	s 44
(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)
(b)	(b)	(b)	(b)	(b)	(b)	(b)	(b)	(b)

NSW	VIC	SA	Qld	WA	Tas	ACT	NT	NZ
(c)	(c)	(c)	(c)	(c)	(c)	(c)	(c)	(c)
s 42	s 46	s 42	s 45	s 55	s 47	s 48	s 46	s 45
(1)	-	(1)	(1)	(1)	(1)	(1)	(1)	(1)
(2)	-	(2)	(2)	(2)	(2)	(2)	(2)	(2)
-	-	-	-	(3)	-	-	-	-
s 43	s 47	s 43	s 46	s 56	s 48	s 49	s 47	s 46
s 44	s 48	s 44	s 47	s 57	s 49	s 50	s 48	s 47
-	-	-	-	(1)	-	(1)		-
(a)	(a)	(a)	(a)	(2)	(a)	(2)	(a)	(a)
(b)	(b)	(b)	(b)	(3)	(b)	(3)	(b)	(b)
1	(i)	(i)	(i)	(a)	(i)	(a)	(i)	(i)
2	(ii)	(ii)	(ii)	(b)	(ii)	(b)	(ii)	(ii)
3	(iii)	(iii)	(iii)	(c)	(iii)	(c)	(iii)	(iii)
4	(iv)	(iv)	(iv)	(d)	(iv)	(d)	(iv)	(iv)
s 46	s 4	s 1C	s 121	s 6	s 5	s 5	s 4	s 3
s 47	s 2(1)	-	-	-	-	s 3	s 49	s 1(2)
-	s 2(2)	-	-	-	-	-	s 50	s 1(3)

Limited Partnerships and Incorporated Limited Partnerships*

NSW	VIC	SA	Qld	WA	Tas	ACT	NT	NZ
s 49	s 49, s 81	s 1B	ss 48, 70 & Sch	ss3, 4(1)	s 4(1)	s 51	s 3	s 4
s 50	s 49(3), s 82	s 47	s 5A	s 7	s 50	s 52	s 50	-
s 50A	s 52, s 83	s 48	ss50(1), 5, 71	s 51	s 53	s 51	s 7	
s 51	s 50, s 85	s 49	s 49, s 73	s 4(2)	s 52	s 55	s 53	s 8
s 52	s 51, s 85(1)	s 50	s 73	s 4(2)	s 53	s 55	s 53	s 8

NSW	VIC	SA	Qld	WA	Tas	ACT	NT	NZ
s 53	s 84	s 51	s 72	-	s 54	s 54	s 52	s 11
s 53A	s 95	s 51A	s 83	-	s 55	s 65	s 63	s 12
s 53B	s 86	s 51B	s 74	-	s 56	s 56	s 54	s 9
s 53C	s 96	s 51C	s 84	-	s 57	s 66	s 64	-
s 53D	s 54, s 87	s 51D	s 51, s 75	-	s 58	s 57	s 55	-
s 54	s 54, s 88	s 52	s 50, s 76	s 8	s 59	s 58	s 56	s 52
s 55	s 55, s 89	s 53	- s 77	s 13	s 60	s 59	s 57	s 51 s 34
s 55A	s 94	s 53A	s 82	-	s 61	s 64	s 62	-
s 56	s 56, s 91	s 55	ss 52, 66 & 79	s 9	s 62	s 61	s 59	s 59 s 61
s 57	s 57, s 90	s 54, s 57	s 51, s 78	-	s 63	s 60	s 58	s 54 s 55
s 58	s 58, s 92	s 56	s 51, s 80	s 13	s 64	s 62	s 60	s 53
s 59	s 59, s 93	-	s 81	-	s 65	s 63	s 61	-
s 60	s 60	s 58	s 53	s 4(2)	s 66	s 67	s 65	-
s 61	s 61	s 59	-	-	s 67	-	-	-
s 62	s 62	s 60	s 52 s 91	s 9, s 10	s 68	s 72	s 71	-
s 63	s 63	s 61	-	-	s 69	s 73	s 72 s 73	-
s 64	s 64	s 62	s 54	-	s 70	s 74	s 74	-

NSW	VIC	SA	Qld	WA	Tas	ACT	NT	NZ
s 64A	s 64A	s 62A	-	-	s 71	s 75	s 75	-
s 65	s 65	s 63	s 55	s 4(3)	s 72	-	-	-
s 66	s 66	s 64	-	-	s 73	-	-	-
s 66A	s 97	s 64A	s 86	-	s 74	s 67	s 65	s 31
s 66B	s 102	s 64B	s 91	-	s 75	s 72	s 71	s 24
s 66C	s 103	s 64C	s 92	-	s 76	s 73	s 72	s 25
s 66D	s 104	s 64D	s 93	-	s 77	s 74	s 73, s 74	-
s 66E	s 105	s 64E	s 94	-	s 78	s 75	s 75	-
s 67	s 67	s 65	s 60	s 6	s 79	-	-	-
s 67A	s 98	s 65A	s 87	-	s 80 (1)-(7)	s 68	s 66, s 67	s 30 s 31
s 67B	s 99	s 65B	s 88	-	s 80 (8)-(10)	s 69	s 68	-
s 68	s 68, s 100	s 66	s 60(5) s 89	s 6(5)	s 81	s 70	s 69	-
s 69	s 69, s 101	s 67	s 60(5) s 90	s 6(5)	s 82	s 71	s 70	-
s 70	s 70	s 68	s 61	s 6(2), s 6(5)	s 83	-	-	-
s 71	s 71	s 69	s 62	-	s 84	-	-	s 86
s 72	s 72	s 70	s 63	-	s 85	-	-	s 98
s 73	s 73	s 71	s 64	s 6(3)	s 86	-	-	s 87
-	-	-	s 65	-	-	-	-	-

NSW	VIC	SA	Qld	WA	Tas	ACT	NT	NZ
-	-	-	s 67	-	-	-	-	-
-	-	-	s 68	-	-	-	-	-
-	-	-	s 69	-	-	-	-	-
-	s 74	-	-	-	-	-	-	-
s 73A	-	s 71A	-	-	s 87	-	-	-
s 73B	s 115	s 71B	s 104	-	s 88	s 85	s 85	-
s 73C	s 116	s 71C	s 105	-	s 89	s 86	s 86	-
s 73D	s 117	s 71D	s 106	-	s 90	s 87	s 87	-
s 73E	s 120	s 71E	s 109	-	s 91	s 91	s 91	-
s 74	-	-	s 73	-	-	s 92	-	-
-	-	-	s 74		-	-	-	-
s 75	s 75, s 118	s 75	ss 56, s 57 & s 107	-	s 93	s 88, s 89	s 88, s 90	s 32
-	-	-	s 58	-	-	-	-	-
s 76	s 76, s 119	s 76	s 59, s 108	-	s 94	s 90	s 89	s 67
s 77	s 77, s 121	s 77	s 117	-	s 95	s 92	s 92	s 70
s 78	s 78, s 122	s 78	s 118	-	s 96	s 93	s 93	-
-	-	-	-	-	-	s 99	-	-
-	-	-	s 119	-	-	s 100	s 98	-
s 79	s 79, s 123	s 79	s 113, s 114	-	s 97	-	-	-

NSW	VIC	SA	Qld	WA	Tas	ACT	NT	NZ
-	s 79A	s 72	-	-	-	-	-	-
-	s 79B	-	-	-	-	-	-	-
-	s 79C	-	-	-	-	-	-	-
-	s 79D	-	-	-	-	-	-	-
-	s 79E	-	-	-	-	-	-	-
-	s 79F	-	-	-	-	-	-	-
-	s 79G	-	-	-	-	-	-	-
s 80	-	-	s 116	-	-	-	-	-
s 80A	s 126	s 79A	s 111	-	s 98	s 96	s 95	-
s 80B	s 124	s 79B	s 110	-	s 99	s 94	s 94	-
-	s 125	s 79C	s 112	-	-	s 95	s 97	-
-	s 127	-	s 115	-	-	s 97	-	-
-	-	s 80	-	-	-	-	-	-
-	-	s 81	-	-	-	-	-	-
-	-	s 82	-	-	-	-	-	-
s 81	s 80, s128	s 83	s 120	s 17	s 100	s 101	s 99	s 116
s 81A	-	s 84	-	-	s 101	s 98	s 96	-
s 82	-	-	-	-	-	-	-	-
-	-	-	-	-	-	-	s 100	-
s 83	-	Sch 1	Chap 6	-	-	-	s 101	-
Sch 1					Sch 1			

NSW	VIC	SA	Qld	WA	Tas	ACT	NT	NZ
1	s 106	Reg 3	s 95	-	1	s 76	s 76	-
2	s 107	Reg 4	s 96	-	2	s 77	s 77	-
3	s 108	Reg 5	s 97	-	3	s 78	s 78	-
4	s 109	Reg 6	s 98	-	4	s 79	s 79	-
5	s 110	Reg 7	s 99	-	5	s 80	s 80	-
[illegible]	s 111	Reg 9	s 100	-	6	s 81	s 81	-
[illegible]	s 112	Reg 10	s 101	-	7	s 82	s 82	-
8	s 113	Reg 11	s 102	-	8	s 83	s 83	-
	s 114	Reg 12	s 103	-	9	s 84	s 84	-
Sch 2		Sch 1						
1	-	1	-	-	-	-	-	-
2	-	2	s 124 s 125	-	-	-	-	-

*Note that the New Zealand references in relation to limited partnerships are to the *Limited Partnerships Act 2008* (NZ).

1 The Nature of Partnerships

1.1 INTRODUCTION

The business environment

[1.10] By and large, businesses in both Australia and New Zealand are run by sole traders, partnerships, companies and trading trusts. Each organisation is governed by its own specific legal rules that regulate matters such as the constitution of the business, the way it can operate and the actual or potential liability of both the business itself and the people behind it. Many of these rules come simply from the common law or from equity but with partnerships, companies and trading trusts much of the applicable law is now found in statute.

The applicable law

[1.20] With companies and, to an extent, trading trusts, the bulk of the statutory provisions are contained in the relevant companies' legislation.[1] With partnerships the relevant law is contained in the Partnership Acts of each of the jurisdictions.[2] These Acts are all based on the *Partnership Act 1890* (UK), they are almost identical in content (though the section numbers differ) and they are mainly statutory consolidations of the common law and equitable rules that the courts developed before the Acts were passed to regulate the formation, operation and dissolution of partnerships.

The Partnership Acts are all relatively short (at least so far as their general provisions are concerned) and they do not purport to contain *all*

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1. In Australia this is the *Corporations Act 2001* (Cth). In New Zealand it is the *Companies Act 1993* (NZ).
2. NSW, *Partnership Act 1892*; Vic, *Partnership Act 1958*; SA, *Partnership Act 1891*; Qld, *Partnership Act 1891*; WA, *Partnership Act 1895*; Tas, *Partnership Act 1891*; ACT, *Partnership Act 1963*; NT, *Partnership Act 1997*; NZ, *Partnership Act 1908*.

the law governing partnerships. That is, they are *not* a Code. They simply provide a good general coverage of the law (as it existed when the Acts were passed), which is augmented, as required, by specific common law or equitable rules that were not themselves incorporated into the legislation. In fact, the Acts all specifically provide that "the rules of equity and of common law applicable to partnership shall continue in force *except* so far as they are inconsistent with the express provisions of this Act" (emphasis added).[3] What this section means was explained by the Privy Council in *Cameron v Murdoch* (1986) 63 ALR 575 at 586 as follows:

> That section is in the nature of a sweeping-up provision designed to ensure that the rules of equity and common law applicable to partnership, which were in existence at the time that the Act was passed, should remain in force except in so far as they might be inconsistent with the express provisions of the Act. It is to be stressed that the rules of equity and common law so preserved are the rules of equity and common law relating to partnership, and to partnership only. The result of these matters is, in their Lordships' view, that, when a question of partnership arises, it is the express provisions of the Act to which regard should first be had, and that it is only after such regard has been had that consideration should be given to the effect, if any, of the sweeping up provision in [that section].

The law of partnership, therefore, is not just what is contained in the Acts.

Equitable and common law principles not reflected in their provisions must also be considered as must the whole body of case law that has been developed since the Acts were passed to interpret them and to explain how their provisions apply. In short, partnership law as it now exists consists of an amalgamation of statute, common law, equity and judicial interpretation and none of these can be considered in isolation.

1.2 THE CONTRACT OF PARTNERSHIP

The contractual nature of partnerships

[1.30] An important feature of the partnership relationship is that it is *essentially contractual*. This has two important consequences.

First, whether a particular relationship is a partnership is a mixed question of fact and law that can only be determined by looking at the parties' objectively determined intention, as it appears from all the surrounding facts and circumstances, and *then* deciding whether that relationship is one that the law regards as a "partnership". As Gordon J

3. NSW, s 46; Vic, s 4; SA, s 1C(1); Qld, s 121; WA, s 6; Tas, s 5; ACT, s 5(1); NT, s 4(1), NZ, s 3.

noted in *Bryant Bros v Thiele* [1923] SASR 393 at 401: "The main rule to be observed in determining the existence of a partnership ... is that regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case." Consequently, matters such as the exact terms of the parties' agreement and their conduct, both as between themselves and with third parties, and both before and after reaching their agreement, can all be relevant and may be taken into account in making that determination.

For example, in *Friend v Brooker* (2009) 239 CLR 129 ([1.230] below), the parties were the directors of a company they had set up to run an engineering and construction business. The business got into financial difficulties, Brooker borrowed money to on-lend to it and, when the company went into liquidation, he sought a contribution from Friend on the basis that their relationship was, in reality, either a partnership or a joint venture. The High Court rejected that argument, holding that, as the parties had made a deliberate commercial decision to adopt a company structure for their business, there was no basis on which it could find that they had intended to operate as partners.

Secondly, if the relationship is a partnership, matters such as how long it is to last (and, in particular, whether it is to be a fixed term partnership or a partnership at will: see [8.80] below), how its business is to be conducted, what the rights and liabilities of the partners are and most of the other matters that affect its operation can be (and usually are) agreed between the partners themselves. In other words, in most cases the partners regulate the way in which they behave, the way their relationship is structured and how the business's day-to-day operations are conducted. The Partnership Acts accept this and they contain numerous references to their specific provisions being "subject to any agreement" or applying "unless the contrary intention appears".

Therefore, what the parties intend is of paramount importance in the law of partnership, as it is in the law governing all contracts.

How the contract of partnership arises

[1.40] As a general principle, contracts can arise in several ways:

(a) they can be entered into formally by deed (in which case they will be contracts under seal with the formality and consequences that that entails);

(b) they can be entered into rather more informally but still in writing;

(c) they can be entered into as the result of a word-of-mouth agreement;

(d) they can be partly written and partly oral; or

(e) they can be implied from the conduct of the parties.

Because partnerships are essentially business contracts, the law governing the formalities of their formation is exactly the same as it is for contracts generally. There is no requirement that there be a written agreement to evidence the parties' intention to become or to operate as partners.[4] However, that is the usual practice and it has several distinct advantages:

(a) the written agreement will set out once and for all (and in an unequivocal fashion) that the parties are in fact partners;

(b) it will clearly delineate their respective rights, duties and responsibilities;

(c) if a dispute does arise, the parties will be able to refer to the terms of the written agreement which, if it is well drafted, should prescribe some pre-agreed solution to the dispute or, at least, some pre-agreed means of arriving at a solution; and

(d) the written agreement will allow the parties to make express and undeniable provision for those things that are either not covered by the Partnership Acts or which, although they are provided for in those Acts, can be altered by some express agreement to the contrary if the parties choose to do so.

The "bindingness" of the partnership agreement

[1.50] In normal circumstances, the partnership agreement, whether it is written or verbal, is only binding on the partners themselves. It is not a public document and, although the partners can disclose its contents to others if they choose to do so, third parties are not entitled – as of right – to know, or to be informed of, what it contains or what it provides. Consequently, the partnership agreement does not normally have any effect on the rights or entitlements of third parties doing business with the firm.

For example, assume that a particular partnership agreement provides that any one partner can sign partnership cheques up to a limit of $50,000 but that cheques in excess of that amount have to be counter-signed by another partner. That provision would have no effect on the rights of any third party who accepted a cheque for more than $50,000 bearing only one signature unless he or she had been made

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4. Except in Tasmania where partnerships (as a type of "agreement") that are not to be performed within one year of their formation must be evidenced in writing before they are enforceable: *Mercantile Law Act 1935* (Tas), s 6. Such partnerships are not void if they are not evidenced in writing; they are just unenforceable at law.

aware of the restriction before accepting it. If the cheque were dishonoured on due presentment, that third party could sue all the members of the partnership for the face value and the partners who were not involved in the transaction could not escape liability simply by arguing that the cheque had not been properly authorised.

Similarly, if the firm's bank were to honour the cheque in ignorance of the restriction, the partnership (that is, the partners collectively) could not normally take action against it for wrongful payment. The only real remedy that the partners who were not involved in drawing the cheque would have would be to sue the partner who had drawn it for damages for any loss they suffered as a direct consequential result of the defaulting partner's breach of their agreement. In extreme cases, they could also terminate the partnership because of that breach.

Restrictions in partnership agreements have this limited effectiveness because of the doctrines of ***privity of contract*** and ***ostensible authority***.

Under the doctrine of privity of contract, the terms of a partnership agreement (the contract) are only binding on and can only be enforced by or against the partners (the actual parties to that contract). The provisions of the agreement are not binding on, nor can they be enforced by or against, third parties. As a result, if a partnership agreement contains a term requiring, for example, counter-signature of large denomination cheques, that term will have no effect on third parties, or at least no effect that can be *contractually* enforced against them, unless they were made aware of it and had agreed to abide by it in all of their dealings with the partnership.

The doctrine of ostensible (or apparent) authority is likewise relevant because, under it, third parties are entitled to assume that those who occupy positions that normally carry certain authority will have that authority unless there has been some form of express notification to the contrary. Ostensible authority arises whenever those with actual authority (in this case the partners collectively) expressly or impliedly represent that someone (for example, one of them acting alone) has power to do certain things on behalf of and with the authority of the partnership as a whole and that the partnership will be liable for, will take the benefit of and will accept responsibility for the consequences of that person doing those things.

With partnerships it has long been the law that each partner is the de jure agent of his or her fellow partners, at least for the purpose of doing those things that are usual for carrying on the business of the partnership in the normal way. As a result, each partner has at least ostensible authority to do everything that might be regarded as part of

the everyday normal functioning of the business. This concept is now encapsulated in the Partnership Acts statutory agency section,[5] a provision that has its origins in the mutual trust and understanding that, at least in theory, forms the basis of all partnerships. It is dealt with in greater detail in Chapter 4.

The net result of ostensible authority or the partners' statutory agency in, for example, the cheque scenario above is that a third party dealing with the firm, or even the firm's own bank, would be perfectly safe in assuming that each of the partners would be entitled, singly and in their own names, to do something as basic as sign cheques on the partnership account – unless that third party or the bank was either actually aware of the restriction on that partner's authority or, alternatively, did not know or did not believe that he or she was a partner at all. As a result, the partnership as a whole could not normally refuse payment of the cheque for the simple reason that, to all intents and purposes, it was validly drawn on the partnership account. In practical terms the consequence of all this is that, if there is a restriction imposed on the actual authority of individual partners, that restriction must be communicated to all those with whom the partnership may have dealings if those dealings could be affected by the restriction.

1.3 DEFINING A PARTNERSHIP

What is a partnership?

[1.60] The Partnership Acts define a partnership as "the relation which exists between persons carrying on a business in common with a view of profit".[6] They go on to provide that the relation between members of any company or association which is either incorporated as a company or "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".[7]

Partnerships, therefore, are unincorporated bodies without any separate legal identity of their own, formed to engage in business in order to earn profits that will eventually accrue to their individual partners. As

5. NSW, s 5; Vic, s 9; SA, s 5; Qld, s 8; WA, s 26; Tas, s 10; ACT, s 9; NT, s 9; NZ, s 8.

6. NSW, s 1(1); Vic, s 5(1); SA, s 1(1); Qld, s 5(1); WA, s 7(1); Tas, s 6(1); ACT, s 6(1); NT, s 5(1); NZ, s 4(1).

7. NSW, s 1(2); Vic, s 5(2); SA, s 1(2); Qld, s 5(2); WA, s 4; Tas, s 6(2); ACT, s 6(2); NT, s 5(2); NZ, s 4(2).

Barton J put it in *Cribb v Korn* (1911) 12 CLR 205 at 216 (a decision which is dealt with in more detail in [2.100] below):

> To be partners, they must be shown to have agreed to carry on some business ... in common with a view to making profits and afterwards of dividing them, or of applying them to some agreed object.

Therefore, whether a particular relationship is, in law, a partnership will depend on whether the parties can show that it exhibits all three of the elements that the Partnership Acts require.[8] That is, they must be able to show that they are:

(a) carrying on a business;

(b) in common; and

(c) with a view of profit.

Those requirements clearly exclude groups, such as clubs, that are formed merely for sporting, cultural, recreational, artistic, religious, benevolent or other similar, non-profit, non-business purposes. This is because, as Lord Lindley noted in *Wise v Perpetual Trustee Co Ltd* [1903] AC 139 at 149:

> Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain ...

Also specifically excluded (because they are governed by other legislation) are groups which, while they carry on a business in common with a view of profit, do so through some separate (and at least theoretically independent) incorporated body – such as a company.

Defining the term "business"

[1.70] In *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8–9, Mason J held that, in its ordinary or popular meaning, the term "business" denotes "activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis".

More recently, the High Court has held that even the non-employment-related activities of employees (that is, anything outside what they are obliged to do as employees) can constitute a business. Thus, for example, in *Spriggs v Federal Commissioner of Taxation* (2009) 239 CLR 1, two footballers, employed by their clubs for the purpose of playing football, were held to be concurrently carrying on businesses, exploiting

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8. NSW, s 1(1); Vic, s 5(1); SA, s 1(1); Qld, s 5(1); WA, s 7(1); Tas, s 6(1); ACT, s 6(1); NT, s 5(1); NZ, s 4(1).

their sporting fame, in relation to their (non-playing) promotional, sponsorship, appearances and other activities.

For partnership purposes, the Partnership Acts provide that the word "'business' includes trade, occupation and profession".[9]

The critical word in that definition is, of course, "includes". What it means is that the list set out in the definition is not exhaustive; it simply details some of the pursuits that will be regarded as "businesses" for the purpose of the Acts. That, in turn, means that, to fully understand the concept of "carrying on a business", it is also necessary to look at what the common law regards as a "business" – and that clearly brings definitions, such as the one adopted in *Hope v Bathurst City Council*, and reasoning, such as the court applied in *Spriggs v Federal Commissioner of Taxation*, into consideration.

It also requires an understanding of what the common law does *not* regard as a "business" – and that clearly includes mere passive investment (see *Hitchins v Hitchins*, [1.110] below), activities engaged in merely as a hobby or pastime (see *Hart v Commissioner of Taxation (Cth)* (2003) 131 FCR 203, where the taxpayers' aviation "business" was held to be a mere hobby or pastime), and the incidental trading activities of not-for-profit organisations: see *Wise v Perpetual Trustee Co Ltd* [1903] AC 139 at 149.

The problem, however, is that at common law whether an activity constitutes "carrying on a business" often depends on questions of fact and degree that can only be answered by looking at what the individuals involved in it have done and at the circumstances in which they have done it. That was clearly what happened in all of the cases referred to above. It was also a critical consideration in a number of cases, especially taxation cases fought on whether particular receipts were "business income" (which is taxable) or windfall gains from a hobby or pastime (which are not taxable). See, for example:

[1.80] *Evans v FCT* (1989) 20 ATR 922; 89 ATC 4540

Facts: Between 1979 and 1981 Evans won over $800,000 gambling on horses and greyhounds. Although gambling winnings are normally regarded as windfall gains (and are therefore not taxable), the Commissioner included them in Evans' taxable income, on the grounds that he had derived them by carrying on a *business* of punting. Evans denied that he was in business. He

9. NSW, s 1B(1); Vic, s 3(1); SA, s 1B(1); Qld, Schedule; WA, s 3; Tas, s 4; ACT, Dictionary; NT, s 3; NZ, s 2.

argued that he did not have an office, did not employ support staff, did not use a computer, did not study form, did not subscribe to tipping or other similar services, did not operate any particular system, bet largely on intuition with the TAB or the on-course tote, tended to bet mainly on quinellas, trifectas and other exotic forms of betting and kept no documentary records other than his cheque book butts, bank deposit slips and his TAB telephone account statements.

Held: Evans had not been carrying on a *"business"* of punting because his activities lacked system and organisation. Consequently, his gambling winnings were non-assessable. Hill J summarised the considerations he felt had to be taken into account when determining whether particular activities constituted "carrying on a business", saying (at 939; 4554–5):

> The question of whether a particular activity constitutes a business is often a difficult one involving as it does questions of fact 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 characteristic of the line of business in which the venture is carried on, repetition and a permanent character, continuity and system are all indicia to be considered as a whole, although the absence of any one will not necessarily result in the conclusion that no business is being carried on.

Carrying on a business

[1.90] What, then, does constitute "carrying on a business"? It appears that "business", in the sense of the Partnership Acts , means an active occupation, and that the words "carrying on a business", at least impliedly, mean that there must be a degree of continuity in the conduct of that active occupation, either in fact or in intention.

What this means is that, normally, an isolated act or transaction will not be "carrying on a business", at least in the sense that it will not create what the law regards as a partnership between those involved *unless* there is either a contrary intention or the parties intend that the act, transaction or venture will be repeated.

For example, in the normal course of events the simple act of selling a house for profit would not be "carrying on a business" in the required sense unless there was a definite intention that the selling would be in the nature of a business or that the act will be repeated. That is, unless the parties intend that selling houses will be or will become a business,

that single sale will generally not constitute "carrying on a business". This principle was adverted to by Brett LJ in:

[1.100] *Smith v Anderson* (1880) 15 Ch D 247

Facts: A trust was set up to invest in submarine telegraph companies and subscriptions totalling £400,000 were received. Each subscriber received a certificate for a nominal amount of £100 and a deferred coupon for a one-4,200th part of the trust's funds for each £90 they invested. The trust's income was to be applied, first, to the payment of annual interest of 6 per cent and, secondly, to the redemption of the certificates. After all certificates had been redeemed any remaining funds were to be divided among the holders of the deferred coupons. Smith sued to have the trust wound up as an illegal association arguing that it was, in reality, an illegal partnership because it had more than 20 members, the maximum permitted under s 4 of the *Companies Act 1862* (UK).

Held: The subscribers were not members of an "association formed for the purpose of carrying on any business" and, therefore, there was no illegal "partnership" to dissolve. If the mere act of investing constituted a "business" (which the court doubted) that business was not being "carried on by the subscribers". The trustees carried it on as principals in their own right and not simply as the subscribers' agents. They were the true owners of the assets and the only obligation that they had was an equitable obligation to account to the subscribers as beneficiaries. On the question of whether a business was being carried on, Brett LJ said (at 277–8):

> The expression "carrying on" 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.

[1.110] The NSW Supreme Court subsequently used similar reasoning in *Hitchins v Hitchins* (1999) 47 NSWLR 35 where the relationship between three "joint interest holders" of a share in the Open Hearth Hotel and Partnership was held not to be, itself, a separate partnership. As Bryson J put it (at 38):

> There was no agreement in terms that it should be a partnership and it does not fall within the definition in ... the *Partnership Act*. ... Their relationship is outside the definition because they were not carrying on business in common, in the activity of investing in a share in the partnership which was

> conducting the Open Hearth Hotel and receiving drawings from it. That activity is not rightly characterised as a business; it should be characterised as an investment, but there are no elements of engaging in trade and a flow of transactions which could be thought of as carrying on a business.

Single venture businesses

[1.120] That is not to say that a partnership can never be entered into for a single venture. Quite clearly, at least as the law now stands, it can be if that is what the parties intend. As the court put it in *Minter v Minter* (2000) 10 BPR 18,133; [2000] NSWSC 100 at [81]:

> Today, a single purpose joint venture even though it be an isolated activity does not for that reason escape being a partnership if otherwise it satisfies the criteria for a partnership in the sense of a commercial enterprise with the object of gain or profit.

For example, in *Mann v D'Arcy* [1968] 1 WLR 893; [1968] 2 All ER 172, the parties agreed to become partners in a single venture for the purchase and sale of 350 tons of potatoes that formed part of the cargo of the vessel "Anna Schaar". The existence of the partnership and of the defendants' resulting liability to account to the plaintiff for his share of the profits earned from the venture was upheld.

Similarly, in *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 (discussed in more detail at [2.350] below), the High Court had no hesitation in holding that a media management company and a finance company had entered into a partnership for the pursuit of a single venture activity – the joint management of Australian concert tours for Cilla Black and Elton John.

Consequently, while continuity of operations may be an indication (and probably even a very strong indication) that a business is being carried on, it is probably no longer a "critical" consideration. Deane J adverted to that probability in his judgment in *Chan v Zacharia* (1984) 154 CLR 178 at 196, saying, "a partnership can be confined to one joint activity or be a continuing relationship between its members". It was even more clearly referred to by Dawson J in his judgment in *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 15 where he said:

> 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* suggests that the emphasis which will be placed upon continuity may not be heavy.

Therefore, the critical consideration now appears to be, not whether the activity was a single venture, but whether it was a commercial venture, which the parties entered into with the requisite "business" intent.

"First-of" transactions

[1.130] The same general reasoning can be applied to isolated transactions that are undertaken with the intent that they will be the first of several transactions to be undertaken as a business. In such cases the business can be regarded as having commenced with that activity. As Lord Esher MR noted in *Re Griffin; Ex parte Board of Trade* (1890) 60 LJQB 235 at 237:

> I take the test to be this: if an isolated transaction, which if repeated would be a transaction in a business, is proved to be undertaken *with the intention that it should be the first of several transactions*, that is with the intention of carrying on a business, then it is the first transaction in an existing business. The business exists from the time of the commencement of that transaction ... (emphasis added).

Preliminary activity ("contemplated partnerships")

[1.140] The Partnership Acts require that, before there can be a partnership, the parties must be "*carrying on* a business" (emphasis added). Consequently, a mere agreement to carry on a business as partners at some, even some specified, time in the future does not make the participants partners until that time arrives, unless, of course, they do in fact start carrying on the business at an earlier time. Even then, the question of who participated in the early start can be critical. If one or more of the intending partners starts the business early without the consent or acquiescence of the others, this will still not constitute a partnership involving them all at that point.

The same principle applies where the intending partners engage, even jointly, in activities that are merely preparatory to, but not part of, operating the business. Engaging in those merely preparatory activities will not constitute "carrying on a business" in the required sense because, as the Full Court noted in *Pioneer Concrete Services v Galli* [1985] VR 675 at 706:

> before the business gets under way, those preparatory acts cannot be characterised as constituting or forming part of a business; nor can the participants be described at that stage as carrying on or conducting a business.

Consequently, the relationship between the parties, at least during that preparatory phase, may not be a partnership and the parties may not be subject to the rights, duties and responsibilities that partners owe one another.

Everything will depend, however, on whether the activities are really merely preparatory or whether they are, in fact, part of the agreed venture. Setting up the business can be part of the overall agreed "business activity" and, if it is, the parties will have become partners. That is, there is no absolute rule that the business must have started trading before the "partnership" running it can come into being and, each case must be considered on its own facts. See, for example:

[1.150] ***Khan v Miah*** **[2000] 1 WLR 2123; [2001] 1 All ER 20** –

Facts: The parties agreed to set up and operate an Indian restaurant in partnership. They obtained premises, converted and fitted them out for use as a restaurant, opened a bank account, bought furniture and equipment and made a number of other preliminary arrangements. Unfortunately, before the restaurant opened, their relationship broke down and they ended their association. The respondents then opened the restaurant themselves and carried on business on their own account without any settling of accounts with the appellant. The appellant sued, seeking a share of the business's capital and profits on the grounds that he had been "a partner". The question facing the court was, had a partnership arisen as a result of the parties' joint participation in the preliminary activity or had the parties merely agreed to enter into a partnership *once* the restaurant was ready to open?

Held: Noting (at 2127; 24) that: "There is no rule of law that the parties to a joint venture do not become partners until actual trading commences. The rule is that persons who agree to carry on a business activity as a joint venture do not become partners until they actually embark on *the activity in question*" (emphasis added), the House of Lords found that, in the circumstances, the parties had become partners. What they had done was not simply *preliminary* to carrying on the agreed business, it was part and parcel of what they had jointly agreed to do. As Lord Millett put it (at 2127; 24) (emphasis added):

> They did not agree merely to take over and run a restaurant. They agreed to find suitable premises, fit them out as a restaurant and run the restaurant once they had set it up. The acquisition, conversion, and fitting out of the premises and the purchase of furniture and equipment were all part of the joint venture, were undertaken with a view of ultimate profit, *and formed part of the business which the parties agreed to carry on in partnership together.*

The ambit of this definition of "partnership"

[1.160] The apparent requirement for ongoing business activity only applies in the context of whether a partnership exists, in a commercial sense, for the purposes of the Partnership Acts. It is not a deciding factor in, for example, a question involving taxation liability. For one thing, at least in Australia, the *Income Tax Assessment Act 1997* (Cth) defines "partnership" far more widely than do the Partnership Acts. (It defines them to include not only those who carry on business as partners but also those who *receive income jointly* – so "business activity" is not required for taxation purposes.)[10] For another, the assessability of income does not necessarily depend on how it was earned or whether it was earned from carrying on a business.

Therefore, if a husband and wife were to sell their holiday home, the profit could still be assessable in their hands, as partners for taxation purposes, even though they were clearly not in the *business* of buying and selling houses (and were therefore not partners under the Partnership Acts definition). The requirement to establish the existence of a "business" in order to establish the existence of a partnership is therefore really only relevant when determining whether a particular activity engaged in by two or more persons can create, intentionally or otherwise, what the Partnership Acts regard as a partnership. At least in Australia, a partnership can arise for (for example) taxation purposes even though there would clearly be no partnership under the Partnership Acts. This was well illustrated in:

[1.170] *Tikva Investments Pty Ltd v FCT* **(1972) 128 CLR 158** –

Facts: Krasnostein was a member of a syndicate that acquired part of a grazing property intending to subdivide and sell it. The syndicate was clearly what the Partnership Acts would regard as a partnership. Krasnostein subsequently assigned his interest in the venture to Tikva Investments, a family company. When the land was sold, Tikva Investments was assessed for tax on the basis that it had become a member of a partnership engaged in land development.

Held: Even though it may not have been a partner at general law, Tikva was a partner for taxation purposes because it had received

10. In NZ, s YA 1 of the *Income Tax Act 2007* (NZ) defines partnerships in similarly wide terms to include not only those in relationships described in s 4(1) of the *Partnership Act 1908* (NZ) but also joint venturers and co-owners of property who choose to be treated as partners for the purposes of the *Income Tax Act 2007* (NZ).

income jointly with the other syndicate members. That was all that was required. As Stephen J put it (at 164–5):

> [T]hese amounts were received, if not as the income of a partnership at general law, then as income from property which the syndicate members owned as tenants in common. Accordingly the members of the syndicate were, for the purposes of the [*Income Tax Assessment*] Act, a partnership.

The business must be carried on "in common"

[1.180] The requirement that the business be carried on "in common" means that there must be some joint participation in a common business. Consequently, for example, the relationship between franchisors and franchisees is not normally seen as a partnership. They may be engaged in closely related activities, but they are not carrying on a business in common. Each runs its own business, usually for its own exclusive benefit.

For example, in *Checker Taxicab Ltd v Stone* [1930] NZLR 169 a taxi driver who rented a taxi from the owner, and paid him a percentage of the fares as commission, was held not to be carrying on business in common with the owner of that taxi. There was no joint participation, no shared rights or duties, and each party, in reality, carried on his own separate and distinct business.

The "in common" requirement does not, however, mean that all of the alleged partners must take an active part in the affairs of that business. It simply means that the business must be carried on *by or on behalf of the partners*. Whether that is the case is a question of fact that can only be answered by looking at all the facts and circumstances of the arrangement. The *test* appears to be: "Does the person who, in fact, carries on the business do so as *agent* for the persons alleged to be partners?" That test comes from the judgment of Griffiths CJ (at 11) in:

[1.190] *Lang v James Morrison & Co Ltd* **(1911) 13 CLR 1**

Facts: Thomas McFarland & Co (which J W McFarland ran as a sole tradership) had a contract to ship frozen carcasses to James Morrison & Co Ltd, a London company that knew that J W McFarland was the firm's sole principal. McFarland later entered into a quite separate partnership with Lang (the appellant) and Keates. That partnership operated as McFarland, Lang & Co and it carried on business as stock and station agents, livestock exporters and general commission agents. Meat export was not part of the firm's business and both Lang and Keates had refused

to have anything to do with it. Despite that, J W McFarland told James Morrison & Co Ltd that he had taken Lang and Keates into partnership. From this, the London company formed the opinion that the firm with which it was then dealing consisted of McFarland, Lang and Keates. Thomas McFarland & Co subsequently breached its supply contract and, because McFarland and Keates were both then bankrupt, James Morrison & Co Ltd sued Lang as the only apparently solvent "partner". Lang denied liability, arguing that he was not and had never been a partner in Thomas McFarland & Co.

Held: On the evidence Lang had taken no active part in the operations of Thomas McFarland & Co. He had not operated its bank account, had not been included in discussions of its operations, his own partnership had kept entirely separate books and, although he had signed letters for Thomas McFarland & Co, they were letters that J W McFarland had dictated and he had only signed them at McFarland's request and in McFarland's absence. That being so, he could only be liable as a partner if James Morrison & Co Ltd could show that J W McFarland had, as Griffiths CJ put it (at 11), "carried on the business of Thomas McFarland & Co on behalf of himself, Lang and Keates, in this sense, that he was their agent in what he did under the contract with the plaintiffs – not that they would get the benefit, but that he was their agent". On the facts, this had not been the case. Lang was, therefore, not a partner in the firm nor liable for the firm's obligations.

[1.200] The test used in *Lang v James Morrison & Co Ltd* – did the person carrying on the business do so as agent for the alleged partners? – can be applied in any number of situations. For example, in husband and wife partnership situations (such as are common particularly in the trades), the wife often takes no active part in the business (and may not even be qualified). However, the existence of a partnership is rarely, if ever, disputed and it is generally accepted that the husband operates the business, in fact and in law, on behalf of both himself and his wife. Consequently, he and his wife are partners and the business is conducted by the partnership. See, for example, *Kelly v Kelly* (1990) 92 ALR 74; 64 ALJR 234 ([5.300] below).

Similarly, where a management committee runs the firm's business (see, for example, *Atwell v Roberts (No 3)* [2009] WASC 96) or an employee manager runs it (see, for example, *Playfair Development Corp Pty Ltd v Ryan* [1969] 2 NSWR 661) and the owners take no active part in it

becaus of age, disinclination or other reasons, the business is still being conducted by a partnership and the passive owners are the partners. The management committee or the manager runs the business for their benefit and on their behalf.

The corollary is, of course, that those who are actively involved in the running of a business need not necessarily be partners in it. Managers who run businesses for others – and not on their own behalf as well – will not be (and will not be regarded as) partners in it. See, for example:

[1.210] *Re Fisher and Sons* **[1912] 2 KB 491**

Facts: Fisher's will empowered his executors to carry on his business for the benefit of his widow for the remainder of her life. Pursuant to that power the executors continued the business in the firm name after his death. The firm was subsequently sued on two dishonoured bills of exchange and the creditor sought to make the executors liable as "partners".

Held: They were not partners. They were merely carrying on the business on behalf of the estate, not on their own behalf or for their own benefit.

With a view of profit

[1.220] As Santow J noted in *Minter v Minter* (2000) 10 BPR 18,133; [2000] NSWSC 100 (at [92]): "a view to ultimate profit is essential in a partnership"; but, as he also noted, "it has not been essential that there be a profit-making motive in the short term". What this means is that even though the "partners" are carrying on their business in the expectation that there could be losses, at least initially, the business will still be carried on "with a view of profit" if the parties intend that it will *ultimately* earn profits. Therefore, most commercial enterprises will satisfy the requirement that the business be conducted "with a view of profit". Generally, even where an enterprise does operate at a loss, the parties' initial intention will invariably have been to run it at a profit (even if that intention was hopelessly optimistic).

Where the requirement for proof of "a view of profit" is important is in relation to clubs and societies and other not-for-profit organisations. Such bodies are not formed for the purpose of profit-making for their members but for charitable purposes or for the promotion of and participation in pursuits as diverse as playing football or appreciating Shakespeare. Consequently, they cannot, in law, be partnerships because they are simply not carried on with a view of profit for the

members. See again Lord Lindley's comments in *Wise v Perpetual Trustee Co Ltd* [1903] AC 139 at 149, quoted at [1.60] above.

If clubs and societies do, in fact, make a profit (they tend to refer to it as a "surplus") it will usually be merely incidental to their main purpose and therefore, by itself, it will not normally convert the relationship between the members into a partnership. The constitutions of such clubs and societies reinforce this result by almost always providing that the members are not entitled to demand a distribution of any profits, at least while the club is a going concern. See, for example *Coleambally Irrigation Mutual Co-operative Ltd v Commissioner of Taxation* (2004) 139 FCR 115.

Partnerships and companies

[1.230] While the three elements that are required to establish the existence of a partnership can usually be identified when one looks at companies, companies are not partnerships and their activities are in no way governed by the Partnership Acts. This is because those Acts specifically provide that companies are not partnerships.[11] To a lesser extent, the same effect is also achieved by implication, at least in Australia, through the prohibition of outsize partnerships in s 115 of the *Corporations Act 2001* (Cth): see 3.4 below. (New Zealand has no equivalent provision since s 456 of the *Companies Act 1955* (NZ) was repealed in 1994.)

The reason for the distinction between partnerships and companies is quite simple. A partnership is an association of persons actually "carrying on business" together, the partners decide what business will be carried on, they are usually entitled to get involved in the day-to-day operations and they are personally liable (without limit) for the partnership's debts and obligations. Therefore, their association can be for a particular time or for a particular venture and the partners involved will generally be known and fixed. (That is, if a partner resigns or retires or if a new partner is admitted, the old partnership will automatically cease and a new partnership will come into being in its place: see 7.4 and 7.5 below.)

With companies that is not the case. Companies are independent legal entities with a perpetual existence and they obtain their funds from shareholders who are generally, both in fact and in law, merely passive investors. Control of the company, its assets, its operations and its

11. NSW, s 1(2); Vic, s 5(2); SA, s 1(2); Qld, s 5(2); WA, s 4; Tas, s 6(2); ACT, s 6(2); NT, s 5(2); NZ, s 4(2).

decisions usually rests with a board of directors and the individual shareholders usually have no particular managerial, participative or proprietary rights.

The distinction between partnerships and what was a somewhat looser form of corporate entity than is available under modern companies legislation was discussed by James LJ in *Smith v Anderson* (1880) 15 Ch D 247 at 273–4. He said:

> An ordinary partnership is ... composed of definite individuals bound together by contract between themselves to continue combined for some joint object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another. A company ... is the result of an arrangement by which parties intend to form [an association] which is constantly changing, [an association] today consisting of certain members and tomorrow consisting of some only of those members along with others who have come in, so that there will be a constant shifting of the [association], a determination of the old and a creation of a new ... with the intention that ... the new ... shall succeed to the assets and liabilities of the old.

The difference between the two can be very important, even in small, closely held companies where the directors are also the company's sole shareholders and carry on its business almost as they were carrying it on in partnership. The legal position is that they are not partners and, therefore, have no right to expect that their relationship will be governed by the rules that govern partnerships. In some cases that can have very unfortunate consequences. See, for example:

[1.240] *Friend v Brooker* (2009) 239 CLR 129

Facts: Friend and Brooker incorporated a company, Friend & Brooker Pty Ltd, to carry on an engineering and construction business. Their respective family trusts were the sole (and equal) shareholders in the company and Friend and Brooker were the directors. To enable the company to finance a large building project Brooker borrowed funds personally and on-lent them to the company. When the company later went into liquidation, it did not have sufficient assets to repay that loan. Brooker sought a declaration that the company had merely been a corporate vehicle for a partnership between Friend and himself, that they had owed each other fiduciary duties, as partners, to act in good faith in the interests of the business and each other, and that any profit or loss from the business was to be shared equally between them.

Held: Brooker's action failed. He and Friend had taken a deliberate commercial decision to adopt a corporate structure for

their business instead of operating as a partnership. They were shareholders in, and directors of, a company and neither of them was under a fiduciary duty to the other. Their only duties were those they owed the company as directors. Consequently, Brooker was not entitled to a contribution from Friend for the losses he had suffered through his loans to the company (as he would have been if they had been in a partnership instead).

Advantages and disadvantages of partnerships

[1.250] Because of their structure and the law that governs them, partnerships have a number of very clear advantages and disadvantages vis à vis other forms of business organisation (especially companies). The advantages of using a partnership include:

- *Partnerships are simple and cheap to set up.* There are no specific formalities involved in setting up a partnership, including no requirement for a written partnership agreement (though having one is strongly recommended). There are also no registration requirements, nor registration fees (except if the firm is to operate under a name other than the names of the individual partners when, in Australia, its business name has to be registered). The process of setting up a partnership is dealt with in Chapter 3.

- *Partnerships can be simple and cheap to dismantle.* Just as there are no formalities involved in setting up a partnership there are few formalities involved in dismantling one, at least where the partners are prepared to co-operate. The process of dissolution and winding up is dealt with in Chapters 7 to 9.

- *Confidentiality.* Unlike companies, which have to register their constitutional documents and file annual accounts, partnerships are not closely regulated. In particular, they have no formal reporting requirements. Consequently, competitors and other third parties cannot readily gain access to information about them or their operations – unless the partners choose to give it to them. How partners deal with third parties is dealt with in Chapter 4.

- *Participation in management and decision-making.* The partners own the business and are directly responsible for its operations and liable for its debts and obligations. Consequently, all the partners are generally entitled to participate in management and the decision-making process. How the partners interact is dealt with in Chapters 5 and 6.

- *Partnerships are flexible.* What partnerships do is up to the partners. Therefore they can quickly change focus as circumstances change and new opportunities arise. Agreement between the partners is all that is needed (though, if the change is significant, the agreement may have to

be unanimous: see 6.9 below). Moving capital into and out of a partnership is also relatively simple (if the other partners agree). Moving capital into and out of a company can be considerably more difficult (especially if its shares are not listed on a stock exchange).

- *Partners owe fiduciary duties to one another.* The partners are in a relationship that is based on mutual trust and understanding. They owe one another fiduciary duties, which oblige them to act at all times in the interests of the partnership as a whole instead of in their own personal interests: see 5.1 below.

- *Partnerships can be used to reward and retain the services of appropriately skilled and deserving employees.* Introducing a new partner into a partnership and allowing him or her to share in the risks and rewards of the business is relatively easy: see 6.8 below. Sole traderships often evolve into partnerships in this way as their business and/or their need for capital expands.

The disadvantages of using a partnership include:

- *Partnerships have no separate legal existence.* They are not legal entities in their own right and they depend on the legal persona of their individual partners. This has some advantages (for example, partnerships do not pay tax – the individual partners do) but there are also a number of disadvantages, because there is no separate entity with whom the partners can deal. Consequently, for example, the partners cannot be employees of the partnership and, therefore, they cannot access benefits such as superannuation and workers' compensation in the same way that (say) directors of a company can: see 3.2 below.

- *Continuity problems.* Because partnerships are not separate entities, every time a partner leaves or a new partner joins the firm the old partnership terminates and a new partnership starts. This can involve a major reorganisation of the business's finances and/or its operations and in extreme cases it can even result in a complete winding up. There can also be taxation implications for the partners. The major (non-taxation) problems are dealt with in Chapter 9.

- *Limited numbers.* In Australia partnerships are generally limited to a maximum of 20 members (there is no maximum in New Zealand): see 3.4 below. This can create a problem if the existing partners want (or need) to introduce new partners beyond the permitted maximum. In such cases the partnership really has no option but to incorporate and continue its business as a company.

- *Capital may be more difficult to get.* Public companies can raise capital by issuing shares to or borrowing from the public. Partnerships can only raise capital from their partners and, while they can borrow, they

do so on the collective credit of their partners. Consequently, depending on the available collateral (both partnership property and the assets of individual partners), they may find raising funds more difficult.

- *Unlimited liability.* The individual partners are all personally liable, without limit, for the partnership's debts and liabilities. If the partnership property is not sufficient to cover those liabilities the firm's creditors can access each partner's personal assets – even making them personally bankrupt – until their demands are satisfied: see [4.380] below.

- *Statutory agency.* Each partner is an agent both of the firm and of his or her fellow partners, at least in relation to acts done in the course of the firm's business: see 4.1 and 4.2 below. Consequently, each partner can be bound by (and can be financially responsible for) anything those other partners do.

- *Partnership interests are not freely transferable.* A partner cannot simply sell, give away or otherwise dispose of his or her interest in the partnership to some third party. That can only happen if all of his or her other partners agree: see 6.8 below. Consequently, divesting oneself of a partnership interest is not as simple as (say) selling one's shareholding in a listed public company.

- *Some partnership decisions require unanimity.* Decisions about the nature of the partnership business (and, in particular, any decision to change it) must be unanimous: see 6.9 below. This does protect the rights of individual partners not to be involved in (and not to have their money involved in) businesses they did not anticipate but it can thwart the wishes of the majority. In such cases the only real option is to dissolve the partnership – maybe by buying out the dissenting partners – with all of the problems that can involve: see Chapter 9.