CHAPTER 1

PARTNERSHIPS, TRUSTS AND ASSOCIATIONS

COVERED IN THIS CHAPTER

- Identification of different business structures
- Explanation of the role of partnership
- Description of trusts and joint ventures
- Explanation of association

CASES TO REMEMBER

Bradley Egg Farm Ltd v Clifford and others (1943) 2 All ER 378
Carlton Cricket and Football Social Club v Joseph [1970] VR 487
Chan v Zacharia (1984) 154 CLR 178; [1984] HCA 36
Freeman v McManus [1958] VR 15
Peckham v Moore [1975] 1 NSWLR 353
Re Griffin Ex Parte Board of Trade (1890) 60 LJQB 235
Smith v Anderson (1880) 15 Ch D 247
United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1; [1985] HCA 49

STATUTES AND SECTIONS TO REMEMBER

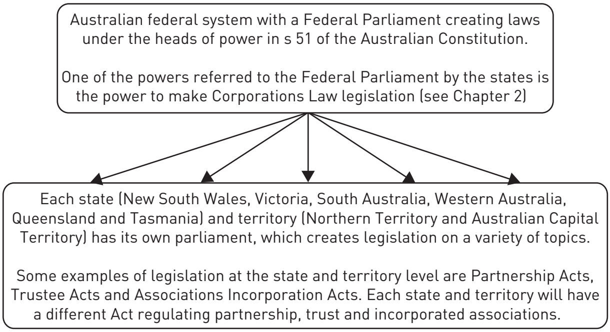
Partnership Acts in the different jurisdictions
Trustee Acts in the different jurisdictions
Associations Incorporation Acts in the different jurisdictions

1.1 INTRODUCTION

Australia operates under a federal system of government, with specified powers granted to the central federal (Commonwealth) parliament and residual powers vested in the state and territory parliaments. The Australian Constitution splits the legal powers between the Commonwealth (the Federal Government) and the various states and territories of Australia.

Further, Australia has a common law system, which relies upon case law being developed over time from both the common law and equity. These cases are binding through the hierarchy of the courts. Such a common law system has to be taken into account when dealing with business structures such as partnerships, trusts or companies.

FIGURE 1.1 Division of power between state and federal levels



As shown in Figure 1.1, the area regulating corporations is now a Commonwealth matter, while trust and partnership are covered as state matters.

This chapter explains the different types of business enterprises. Although more than 2.1 million companies are registered in Australia, other types of business structure need to be evaluated. The major choices, other than companies, are:

- sole trader;
- joint venture;
- partnership;
- trust;
- association; and
- company (not discussed in this chapter: see chapters 2–8).

Although businesses can also be established as co-operatives, mutuals and syndicates, these are beyond the scope of this book.

The selection of the best type of business structure or enterprise will depend upon a variety of factors. The key questions in determining business structure are:

- How easy is it to establish the business?
- What is the cost of setting up the business?
- Are there any minimum or maximum capital requirements?
- What are the applicable laws, and who will control the management of the business?
- What is the degree of business flexibility?
- What taxation rate applies: personal (for the financial year 2014–15, the top rate for individuals is 45%) or company (for the financial year 2014–15, the tax rate for companies is 30%)?
- What is the expected size of the business enterprise?
- What is the process involved in any later sale of the business entity or part?
- What is the process of termination of the business?

Although there is in theory a great choice of business structures, a business will often end up being registered as a company because there is a general perception that it is the most appropriate structure. The reason is that a company can be treated in the same way as an individual (s 124 of the *Corporations Act:* see 2.6).

1.2 WHAT ARE THE LEGAL REQUIREMENTS OF A SOLE TRADER?

A sole trader is a one-person business. An individual is allowed to operate in business as a sole trader under Australian law, and that business structure is very easy to establish. However, unlike companies, the trader and the business are treated as one. The law does not distinguish between them. Further, no specific statute regulates sole traders (there is no particular sole trader legislation). Thus, the sole trader is governed by the ordinary commercial laws of Australia, which include contract, tort, crime, agency, and trust law and legislation, state Fair Trading Acts, and even the *Competition and Consumer Act 2010* (Cth) (more specifically the Australian Consumer Law – Schedule 2 in the *Competition and Consumer Act 2010*).

TABLE 1.1 Advantages and disadvantages of sole trader structure

ADVANTAGES	DISADVANTAGES
Minimal formalities and regulations There are very few formalities to be followed when a person is setting up a business as a sole trader. For instance, a person can set up a kiosk to sell newspapers with a sign reading ‘NEWSPAPERS SOLD HERE’. If a business name is being used, then registration of that name under the business names legislation of the appropriate state or territory will be essential.	**Unlimited liability** The sole trader is personally liable for all the debts of the company.
Total control The sole trader is in control of the business.	**Limited capital and management resources** The sole trader cannot raise capital on the market.
No sharing of management or profits The sole trader keeps all the profit made by the business.	**Limited life** The business will last as long as the owner wants it to. The structure is linked to the identity of the trader. Accordingly, the death of the trader will mean the end of the business in its current form.

Sole traders have only limited taxation issues to take into account, and the individual will be personally liable for any debts the business incurs. A sole trader may obtain an ABN from the Australian Tax Office (ATO) and may be required to make annual or quarterly payments to the government based on the Business Activity Statement (BAS).

The benefit of the sole trader structure is that the person has a lot of flexibility and is in control of the business. This has to be weighed up against the lack of capital for expansion, the shortage of skills and the potential for unlimited liability for debts. Unlimited liability simply means that the (human) sole trader is personally liable for all the debts of the business. Some professionals, such as barristers, are required to operate as sole traders and are prohibited from being in partnership or a corporate body.

1.3 WHAT ARE THE LEGAL ISSUES FOR PARTNERSHIPS?

Partnerships require at least two people to come together with the intention to make a profit. Partnerships have a maximum number of 20 partners (s 115 of the *Corporations Act*). Exceptions are professional practices, such as law firms, which may have up to 400 partners, and accountancy firms, which may have 1000 partners. The most relevant laws governing partnerships are common law, equity and the codified state or territory *Partnership Act*: *Partnership Act* 1892 (NSW); 1891 (Qld); 1891 (SA); 1891 (Tas); 1895 (WA); 1958 (Vic); 1963 (ACT); 1997 (NT). These Acts have not changed much in the last 100 years. They are based on the UK Partnership Act of 1890. In 1991, the *Partnership Act 1892* (NSW) was amended to allow some partners to have limited liability by virtue of the *Partnership (Limited Partnership) Amendment Act 1991* (NSW). Similar provisions apply in other states and territories. However, every limited partnerships must be registered with the state government and have at least one unlimited liability partner. If a limited partner becomes involved in the management of the business, then their protection from financial liability is removed. The limited partners are intended to be silent investors only, not active or managing partners.

1.3.1 DEFINITION OF A PARTNERSHIP

The Partnership Act in each jurisdiction provides a definition of a partnership and states that 'partnership is the relation which subsists between persons carrying on a business in common with a view of profit' (NSW s 1; Qld 5; SA s 1; Tas s 6; WA s 7; Vic s 5; ACT s 6; NT s 5).

Arising from this definition are three essential elements for a partnership to exist. They are:

1 Carrying on a business

We need to consider two definitions when looking at this element: the meaning of 'business' and of 'carry on'. The Partnership Acts provide that a business includes 'every trade, occupation or profession' (NSW s 1B; Qld s 3; SA s 45; Tas s 4; WA s 3; Vic s 3; ACT s 4; NT s 3).

These statutes do not specify what is meant by 'carry on'. In *Smith v Anderson* (1880) 15 Ch D 247 the court noted that '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 … The association, then, must be formed in order to carry on a series of acts having the acquisition of gain for their object' (at 277–8).

Accordingly, carrying on a business requires repetition of an act. But an isolated act can still satisfy the statutory requirement so long as it is accompanied with an intention to repeat an act, as noted in *Re Griffin Ex Parte Board of Trade* (1890) 60 LJQB 235 at 237: 'If an isolated transaction, which if repeated would be a transaction in a business, is proved to have been undertaken with the intention that it should be the first of several transactions, that is with the intent of carrying on a business, then it is a first transaction in an existing business.'

However, it is important to note that there have been cases where a venture has been deemed a partnership even though it may have been regarded as a single venture. For example, in *United Dominions Corporation Ltd v Brian Pty Ltd* (1985), the High Court has noted that a 'single adventure under our law may or may not, depending upon its scope, amount to the carrying on of a business … Whilst the phrase "carrying on a business" contains an element of continuity or repetition in contrast with an isolated transaction which is not to be repeated, the decision of this court in *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321, suggests that the emphasis which will be placed upon continuity may not be heavy'.

2 In common

In the statutory definition of partnership, the word 'in common' is a key element of the definition of a partnership as it reflects the requirement that each partner is a principal in the business. This does not mean that all the partners must take an active role in the affairs of the business. It simply means that the business must be carried on by or on behalf of the partners. For example in *Duke Group Ltd v Pilmer* (1999) 31 ACSR 213, the court has noted that '[i]n order to meet this criterion, it is not necessary that each of the alleged partners should take an active part in the direction and management of the firm. The business may well be carried on by or on behalf of the partners by someone else. The person carrying on the business must be doing so as agent for all the other persons who are said to be partners'.

The agency relationship has been highlighted as an important criterion when determining whether the element 'in common' is there. In *Lang v James Morrison & Co Ltd* (1911) 13 CLR 1, Griffith CJ said 'now in order to establish that there was a partnership it is necessary to prove that JW McFarland 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' (at 11).

In addition to this agency relationship, a mutuality of rights and obligations must exist. In *Smith v Anderson* (1880) 15 Ch D 247, James LJ observed that 'persons who have no mutual rights and obligations do not, according to my view, constitute an association because they happen to have a common interest or several interests in something which is to be divided between them'.

Accordingly, whether the element 'in common' is present or not is a question of fact. Two key criteria should be considered: (1) does an agency relationship exist between the partners and (2) do the parties involved in the business have mutual rights and obligations?

3 View of profit

The object of the business is the acquisition of financial gain. It does not matter whether the venture is successful or not, so long as the requisite intention is present. The three elements for a partnership is illustrated in Figure 1.2.

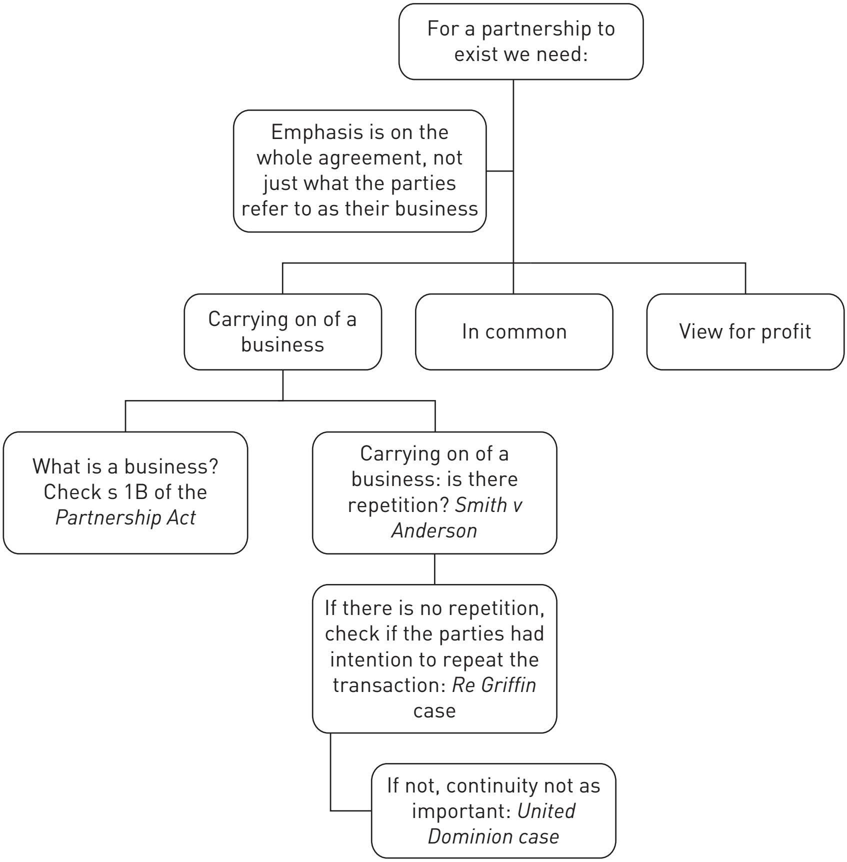
Partnerships are quick and easy to establish—both informally and more formally with a partnership deed (contract)—but can run into difficulties with unlimited liability. Partners are personally liable for the debts of the partnership. A partnership, after all, is *not a separate legal entity*. (Recall that 'separate legal entity' means that the business entity is distinct from the identity of the people running the business.)

The following relationships may look like partnerships but they are not deemed to be partnerships unless the three elements of a partnership are also there (NSW s 2; Qld 6; SA s 2; Tas s 7; WA s 8; Vic s 6; ACT s 7; NT s 6):

- co-ownership;
- sharing gross return.

Sharing profit, while it creates a strong presumption that a partnership exists, is not conclusive evidence (see NSW s 2; Qld 6; SA s 2; Tas s 7; WA s 8; Vic s 6; ACT s 7; NT s 6).

FIGURE 1.2 Elements of a partnership



1.3.2 LIABILITY OF PARTNERS TO OUTSIDERS

Although the Partnership Acts recognise different types of partners—general or active partners and sleeping or silent partners—at common law they are all agents of the firm and may be involved in its management. This principle was laid down originally in *Re Baird's case* (1870) LR 5 Ch App 725 and is now enshrined in the state Partnership Acts. This means that every partner is an agent of the firm and of the other partners. If a transaction arises in the usual or normal course of business and the third party dealing with the partner is unaware of any lack of authority, then the firm is still held liable as the principal of the transaction. Liability can be imposed either by contract or by tort, on all of the partners, by virtue of the Partnership Acts (NSW s 5; Qld 8; SA s 5; Tas s 6; WA s 26; Vic s 9; ACT s 9; NT s 9).

For liability in contract, partners are deemed agents of each other. Accordingly, a partner has the power to bind the other partners in contract:

- **In cases of *actual* authority** (express or implied) a partner will have the power to bind the rest of the partners: the relevant authority is the actual authority given by the firm to a particular partner. If a partner who is acting within their actual authority buys goods on behalf of the firm, then of course the firm is bound. Usually partners have implied powers to enter into any contract that relates to the partnership business.
- **In cases of *apparent* authority**, a problem will arise where a partner exceeds their actual authority. The question will be: are the other partners liable? The partners will be liable only if four elements are there:
    - The kind of business carried on. Partners will be liable for the acts of any of the partners if those acts are of a kind of business the firm usually carries on. Determining whether a transaction is within the scope of a particular kind of business is a question of fact.
    - Whether the transaction was conducted in the usual way. Even if what a partner does is within the scope of the firm's business, an outsider should normally be suspicious if the transaction is not being done 'in the usual way'. For example in *Goldberg v Jenkins* (1889) 15 VLR 36 the court held that a partner borrowing funds on behalf of the firm at a rate of 60% interest was not acting in the usual way, and the rest of the partners were not bound, because the rate was far in excess of the normal commercial interest rate at that time.
    - The outsider must not know or suspect that the partner was exceeding their authority.
    - The outsider must have known, or at least believed, that the person with whom they were dealing was a partner.
- **Upon ratification:** even if a particular transaction falls outside the scope of actual or apparent authority, the firm will be bound if it ratifies the action of the acting partner. Ratification can be express or implied.

Partners are jointly liable for contracts incurred by the partnership (NSW s 9; Qld 12; SA s 9; Tas s 14; WA s 16; Vic s 13; ACT s 13; NT s 16). Joint liability means that the outsider who signed a contract with the partner can only initiate one legal action. An outsider who decides to sue one of the partners will not be able to initiate further legal action against the rest of the partners if the first action fails. Accordingly, it is best for the outsider to sue the firm (all the partners in the partnership) in the first place.

Partners can also be liable for the wrongful act or omission of any partner who is acting in the ordinary course of the partnership business (NSW ss 10–13; Qld ss 13–16; SA ss 10–13; Tas ss 15–18; WA ss 17–20; Vic ss 14–17; ACT ss 14–17; NT ss 16). This was clearly illustrated in the case of *Polkinghorne v Holland* (1934)

51 CLR 143, where P was a client of the solicitors Holland and Whittington (H&W). H senior normally dealt with P, but on occasions H junior gave her advice on investments. P was advised on some questionable transactions and lost a considerable amount of money, and then H junior disappeared. The firm of solicitors was sued for the losses and the court held that the advice was in the usual course of H&W business as solicitors; the partners were therefore liable for H junior's fraud.

Under tort law the liability of partners is joint and several. This means the outsider can sue any or all the partners, and if they sue one partner but do not recover the amount from that partner, they can initiate legal action against the rest of the partners. This situation is very different from joint liability, where an outsider is only entitled to one legal action.

1.3.3 RELATIONSHIP BETWEEN PARTNERS

Each partner owes a fiduciary duty to the partnership (usually called the 'firm', although it is important to remember that a partnership is not a separate legal entity) and to each partner. Thus, if one partner binds the partnership to a contract, all the partners are equally liable for the debt. If a partner becomes bankrupt, the other partners can be liable for that partner's debt as well.

All partners owe *fiduciary duties:* they are not to make secret profits or allow conflicts of interests to arise between their personal affairs and the partnership. The High Court had to consider the duties of a two-doctor partnership in *Chan v Zacharia* (1984) 154 CLR 178.

A CASE TO REMEMBER

Chan v Zacharia (1984) 154 CLR 178; [1984] HCA 36

Facts: Two doctors, Chan and Zacharia, were partners in a medical practice. They decided to dissolve their practice and Chan took the lease of the premises (one of the valuable assets of the partnership). Chan did not disclose his conduct to the other partner. Chan sought to continue the medical practice on his own by excluding the other partner.

Held: The court held that the opportunity of the renewal of the lease belonged to the partnership and as such Chan could only hold it on a constructive trust for both of them, as beneficiaries.

Principle of law: Partners owe a fiduciary duty to each other. The duty continues even after dissolution of the partnership, at least until all the debts of the partnership have been paid and all the assets have been divided.

This principle is now reinforced by statute (NSW ss 28–30; Qld ss 31–33; SA ss 28–30; Tas ss 33–35; WA ss 39–41; Vic ss 32–34; ACT ss 33–35; NT ss 32–34).

TABLE 1.2 Advantages and disadvantages of a partnership

ADVANTAGES	DISADVANTAGES
Partnerships are simple and cheap to set up and to dismantle.	Partnerships have no separate legal entity.
Partnerships are very flexible. The partners decide the way the business is going to run.	A limited number of people can be involved in the partnership.
There is no formal requirement of disclosure to the public.	Continuity problem: The death of a partner may lead to dissolution of a partnership.
	Capital may be difficult to get. Unlike public companies, the partnership cannot raise capital on the market.
	Partners have unlimited liability.
	Partnership interests are not freely transferable.

1.4 WHAT IS A JOINT VENTURE?

1.4.1 JOINT VENTURE – DEFINITION

Joint ventures are sometimes called syndicates or consortiums. All are terms employed for avoiding the legal relationship of a partnership. They are agreements by contract to engage in an ad hoc profit project by combining resources, but without binding the other venturers. Examples include exploration for minerals and exploitation of new technologies.

No matter what they call the relationship, the joint venturers may still be deemed to be partners, as held by the High Court of Australia (HCA) in *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 59 ALJR 676. If the relationship is a partnership the parties will be held to be fiduciaries.

In the *United Dominions case* the HCA examined the concept of joint ventures and the liabilities imposed upon deemed partners and joint venturers. An agreement existed between UDC, B and SPL to develop some land and to share the profits. UDC provided the finance and SPL owned the land. A substantial profit was made, but B did not receive any of it because a further loan had been taken out on the land by UDC and SPL. The HCA held that the three were acting as partners and thus there had been a breach of the fiduciary duties and B was entitled to some of the profits.

However, if the joint venture is purely a commercial transaction dealt with at arm's length, no presumption of partnership or fiduciary relationship will apply. This was held by the HCA in *Hospital Products Ltd v United States Surgical Corporation* (1984) 55 ALR 417. HP was the Australian distributor of US-made surgical appliances during 1978–79. But it stopped its distribution and copied the products, selling them in Australia as their own. In 1980 the American designers gained an injunction to stop HP, and also claimed an account of profits for the period. The HCA held that there was no fiduciary relationship, so only damages for breach of contract were appropriate.

1.4.2 THINGS TO REMEMBER

It is important not to confuse partnership and joint venture. Some of the key differences between these two business structures are:

- The joint venturers receive a share of the product of the joint venture. In a partnership, the partners receive a share of the profit.
- The liability in a joint venture is individual rather than joint and several as in a partnership.
- Subject to agreement, the joint venturers are free to dispose of their interest in the joint venture. This is not the case in a partnership as the change of parnters may result in the dissolution of the partnership.
- In a joint venture, the parties are not necessarily in a fiduciary relationship. In a partnership, partners owe fiduciary duty to each other.
- In a joint venture the joint venturers are not agents of each other. In a partnership, the partners are agents of each other.

1.5 WHAT IS A TRUST?

1.5.1 ELEMENTS OF A TRUST

A trust can be defined as an equitable obligation contained in a relationship in which person B (the trustee) holds property (the trust property) transferred to them by person A (the settlor) for the benefit of person C (the beneficiary). Accordingly, there are four elements that go to make up a trust. They are the following:

- **Settlor**
  A settlor is the creator of the trust in cases of (1) an *express trust* (created by the intentional act of a person, the settlor, in a written document, the trust deed) or in certain instances (2) an *implied trust* (a type of non-express trust which can arise from circumstances when the intention to create the trust is not expressed). It is possible in such situations for the court to imply or infer that there was an intention to create a trust). The settlor transfers legal title of the trust property (or trust fund) to the trustee and establishes the trust conditions that are binding on the trustee. Where a trust is created unintentionally (as in the case of a constructive trust—a type of non-express trust that courts will create to remedy an injustice), there will not be any settlor. The settlor does not usually have any liability in relation to the trustee for fees or reimbursement for trust expenses. The settlor has no control over the trust after its establishment.

- **Trustee**
  The trustee is the person who will be in charge of the trust property. They will hold the legal title to the trust property (ownership will be 'vested in' the trustee) and they will manage it for the benefit of the beneficiaries. A trustee is the legal owner of the trust property.
- **Beneficiary**
  The beneficiary is the person who benefits from the trust. The beneficiary is the equitable owner of the trust property.
- **Trust property**
  The trust property is also called the 'trust corpus' or fund. To have a trust, it is essential that a trust property, or an interest in some specific property, exists. The trust property can be tangible or intangible, real or personal, a 'chose in possession' (something physical) or a 'chose in action' (a legal right, such as a debt that can be collected). The trust property ownership is divided between the trustee and the beneficiary. The trustee has the legal ownership of the trust property while the beneficiary has the equitable ownership.
  There are different types of trust:
- An *express trust*, as already mentioned, is created by the express and intentional declaration of the settlor. The declaration of intention is usually made in a trust deed. Express trusts may be also classified as discretionary or fixed.
- A *discretionary trust* is a trust under which the identity or interest of the beneficiary or beneficiaries is not determined at the creation of the trust. The trustee has discretion to decide on those matters.
- A *fixed trust* (or non-discretionary trust) is a trust under which the trustee is not required to exercise any continuing discretion. The trust deed will clearly state who the beneficiaries are and what interest they are entitled to.

1.5.2 FIDUCIARY RELATIONSHIP

The cornerstone of the trust relationship is the fiduciary relationship—the relationship of trust and confidence that needs to exist between the trustee and the beneficiaries. The trustee has a duty to act in the best interest of the beneficiary. Trustees will be in breach of their duties if they act for their own benefit instead of the benefit of the beneficiaries. In brief, the trustee's duties are:

- the duty to obey the terms of the trust;
- the duty to keep proper books and records and to provide information to beneficiaries about the performance of the trust—the beneficiaries also have the right to inspect the accounts and the other trust documents;
- the duty to administer the trust personally—trust responsibilities usually cannot be delegated;
- the duty of care. The standard of the duty that is imposed on the trustee is that of a ordinary prudent person looking after the person's own affairs.

1.5.3 THINGS TO REMEMBER

A trust is not a separate legal entity. It operates through the trustee, who will be personally liable for all the activities of the trust.

The main benefits of trusts are the following:

- Property is conserved and protected. This is one of the main goals of the trust. Trusts can provide benefit to members of the family without loss of control over those assets.
- There are tax advantages through 'income splitting'.
- A trust acts as protection for settlor and beneficiaries against liability to outsiders arising out of transactions of the trust. Trusts can protect assets against creditors.
- Trusts can safeguard certain social security entitlements.
- Trusts can also be a way to pass wealth from one generation to the next.
- Trusts can arise to remedy injustice (in cases of constructive trust).

The three special attributes of trusts are:

1. a split between legal and equitable ownership;
2. a fiduciary relationship between trustees and beneficiaries;
3. public policy limitations on trust that are governed both by common law and by statute (for instance, the rule against perpetuities).

The main disadvantages of trusts are:

- A trust has no separate legal entity.
- There can be a considerable cost to establish and maintain the trust.
- The trustee is personally liable for the debt of the trust.
- In cases of discretionary trust, the beneficiaries might be put in a vulnerable position (be left out of distributions).

1.6 WHAT IS AN ASSOCIATION?

There are various legal possibilities for the organisation of an association. The two main types are:

1. unincorporated associations; and
2. incorporated associations.

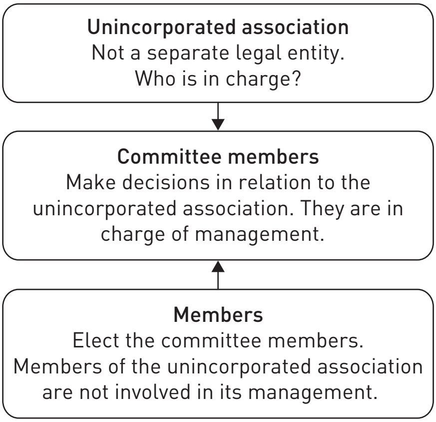
Unincorporated associations and incorporated associations have one thing in common. They are not created to generate profit and financial gain to their members. They are non-profit organisations. They provide structure for a number of activities from recreational and social clubs and societies to religious and political associations.

1.6.1 UNINCORPORATED ASSOCIATION

There is no specific legislation that deals with unincorporated associations. The general law will apply to the parties running the association. However, certain kinds of associations which raise money by requesting donations from the public may need to be registered under various state Acts.

An unincorporated association is not a separate legal entity. Its usual structure is shown in Figure 1.3.

FIGURE 1.3 Structure of an unincorporated association



An issue that can arise for unincorporated associations is the question of liability for contracts entered into on behalf of the association. The committee members and those in a position of control run the risk of unlimited personal liability for their acts, and for short-term contracts taken in the name of the association, as was held in *Bradley Egg Farm Ltd v Clifford and others* (1943) 2 All ER 378.

The situation is a little more complex regarding medium- and long-term contracts.

A CASE TO REMEMBER

Carlton Cricket and Football Social Club v Joseph [1970] VR 487

Facts: Carlton Cricket and Football Social Club (Carlton), a company limited by guarantee, entered into a 21-year lease with Fitzroy Football Club (Fitzroy), an unincorporated association. Carlton alleged that Fitzroy was in breach of the contract.

Held: The court decided that Fitzroy, being an unincorporated association, had no power to enter into the long-term lease. Accordingly, there was no contract in this instance. Further, the committee members are not liable for the contract.

Principle of law: Long-term contracts entered into by unincorporated associations are invalid.

Courts have taken a different view in cases of medium-term contracts.

A CASE TO REMEMBER

Peckham v Moore [1975] 1 NSWLR 353

Facts: In January 1970 Peckham signed a three-year contract to play rugby league football with the Canterbury Bankstown Rugby League Football Club, an unincorporated association. Peckham was injured in 1972 and applied for workers' compensation on the basis that the association was his employer and he was injured during the course of his employment. The issue was: who was his employer?

Held: The club was not the employer. But the club committee was. The question was: which committee would be liable, since each year the association elected a new committee? The court constructed a series of artificial contracts with each committee. There was a contract with the 1970 committee for that year, and similar contracts with the 1971 and 1972 committees. The court noted:

> Once he is put on the payroll by that committee for a given year, that committee becomes his employer for that year and it is to that committee that he must look if he wishes to enforce his rights as a workman.

Principle of law: This case is based on the creation of artificial contracts with every committee. This rule can lead to abuse, because it opens the way for one the parties to sever the agreement at the end of each year.

It is important to acknowledge that *members* of an unincorporated association are not liable for any contracts entered into on their behalf. The liability of the members of an unincorporated association is limited to the amount of their subscription or entrance fee. They do not have to compensate the committee for any payment it made.

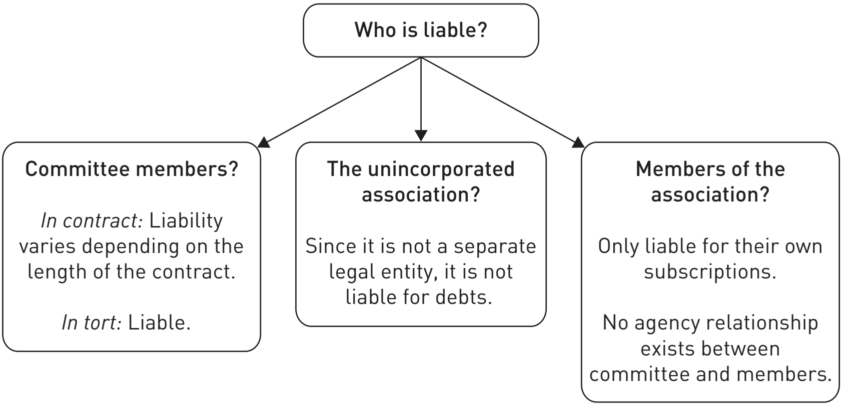
For example in *Freeman v McManus* [1958] VR 15 the court held that '[t]he fact that the members of a society have entrusted its affairs and management to a committee does not give the committee authority to make contracts binding on the members especially in a case where the members have no interest in the society funds'. The liabilities in an unincorporated association are illustrated in Figure 1.4.

1.6.1.1 Things to remember

It is true that unincorporated associations are very easy to set up, but they have several disadvantages. These include:

- The unincorporated association is not a separate legal entity.
- There may be problems with donations. Gifts cannot be held in the name of an unincorporated association because these associations have no separate legal existence.

FIGURE 1.4 Liability in an unincorporated association



- There may be problems with the validity of long-term contracts: are such contracts entered into by unincorporated association valid?
- The committee is liable for the debt of the association.

1.6.2 INCORPORATED ASSOCIATION

To resolve the problems faced by unincorporated associations, such as issues with liability of committee members, an association can be incorporated. Only associations that do not generate profit for their members can be incorporated. Each state and territory has its own Associations Incorporation Act with different requirements. For example, in New South Wales, Victoria and the ACT, an association which applies for incorporation is required to have a minimum of five members. In Western Australia, it must have six members and in Queensland, seven.

An incorporated association can have rules that will deal with its internal governance. The assets of an unincorporated association will usually be transferred to the incorporated association on registration. Since the incorporated association is a separate legal entity, it has all the powers of an individual. An incorporated association is generally managed by a committee whose powers and duties are specified in the association's rules. As a separate legal entity it can receive gifts and own property. Further, it will be liable for any contract entered into on its behalf. The committee and the members of an incorporated association are not liable to contribute towards payment of the debts and liabilities of the incorporated association or the costs, charges and expenses of the winding up of the association.

ASSESSMENT PREPARATION

Revision questions

1 Name two advantages and two disadvantages of running a business in the form of a sole trader.
2 Define a partnership.
3 What is meant by 'carrying on a business'?
4 When are partners bound by a contract signed on behalf of the partnership by a person who has apparent authority?
5 Is a partnership a separate legal entity?
6 What is the different between joint liability and joint and several liability?
7 Define a discretionary trust. How is it different from a fixed trust?
8 Who owns the trust property in a trust?
9 What is the major difference between an incorporated association and an unincorporated association?
10 Who is liable for short-term contracts signed on behalf of an unincorporated association?

Problem question

Bob and Joshua are best friends, and they decide to run a flower shop together. They agree that they are agents of each other, and that Bob will be in charge of leasing suitable premises from which to run the business, and will hire the employees. Joshua is responsible for buying the equipment that they need to run the flower store. Both parties are very excited about the project. Joshua finds pots that he likes and that he believes will be great for the business. He buys fifty of them from Priya and sends the invoice and the merchandise to Bob, who takes delivery of them. However, before any other transaction takes place, Bob and Joshua have a big fight and they are no longer on speaking terms. Any idea of running the business together is scrapped.

Priya has not yet been paid, and she would like to know if there is a partnership between Bob and Joshua. **Advise Priya on this matter.**

For answers to problem questions, please refer to <www.oup.com.au/adams2e>.