

Sole trader
 The main disadvantage of a sole trader is that you find the advantages > disadvantage

Establishment/Formalities:
 formalities/regulation minimal. Some formalities - e. reg of biz name [unless trade under own name], ABN to reg for GST with ATO -> no specific compliance obligations. Also state version of TPA - Fair Trading Act

Control: - total sole control - no sharing mmgt/profits. However that means strength of biz relies on your own skill/expertise

Liability: total control = directly liable. **Unlimited liability** - personal assets at risk

- o Try to minimise with insurance - eg. public liability, workers compensation, biz overhead, professional indemnity insurance

Tax: directly to income earned of individual
Fundraising: limited capital - dependent on traditional avenues of borrowing, on themselves or even friends, relatives and family
Life: Limited life - dies when sole trader dies unlike company which has perpetual succession

Joint Venture and its diff from partnership
From UDC - united dominions corp v brian JV is not a technical term with settled common law meaning but it is

- An **association of persons** for the purpose of **particular** trading, comm, mining or other financial undertaking or endeavour with a view to mutual profit with each participant usually [but not necessarily] contributing money, prop or skill. Such JV will often be a partnership
- **Product sharing [pure JV]** rather than profit sharing [partnership]
- Partnerships = fiduciary + can't compete. Not with pure JV.
- **Labelling not conclusive proof** - court looks at the facts - eg Canny Gabriel and its activities - sharing profit not product

Joint venture
Advantages

Control/mmgt: controlled by mmgt committee - no agency relationship btwn parties unless partnership

Liability is several/not joint/indie when incorporated JV - unincorp JV's personal and unlimited like partnership tho

Taxation - in charge of own tax/accr arrangements - separate - flexible to choose own acct treatment and tax compliance

Property owned as tenants in common - each party has share of prop and freedom to sell their interest in that prop unlike partnership which has no freedom to dispose interest [has to assign interest to another with partnership]

Duration - depends on completion of project, expiry of time, default - single purpose usually or for fixed period whilst partnership can be for years

Disadvantages
Formalities - varies. Sometimes not fixed and can be informal and in expensive but also formal and expensive - INC JV and also depends on industry

Trust
 Equitable(not trust) obligations, binding a person [trustee] to deal with property which they have

Partnership
 The main approach: person carrying on a business in common with another person

1. **Business** - any trade, occupation or profession [only an issue w/ tax deductions - claiming it's a hobby not biz]
2. **Carrying on** - involves continuity and system - evidence of repeat conduct **Smith v Anderson**. Also single transaction but if intent for continuing = carrying on - **Griffith case, UDC Ltd and Canny Gabriel** [emphasis placed on continuity isn't heavy]
3. **In Common** - all partners carrying on - doesn't need to be active involvement as long as other person act as agents with ability to legally bind them [Smith v Anderson - There never has been anything creating any mutual rights or obligations between those persons]. It has no test since there's passive - contributing only money -- but we look if there's reciprocal rights/obligations eg. agency relationship distinguish from cases w/ just common interest like **Keith Murphy** or **Checker Taxi Cab**

- o **S2 of partnership act** - we look for but it by itself is not enough to equal partnership - need to look at all evidence
- a) **Co-ownership** - common ownership of property - **davis v davis**
- b) **Sharing of gross returns** - sharing profits not enough to create partnership - **gripp v corn**
- c) **Sharing of profits and losses** - has 5 types protecting. Protects agency/principal-employer/employee [the company's profits], payment of debt, payment to deceased partner's widow, or payment of interest or payment of goodwill -- however if all are there **Re Megavand; Exparte Delhasse** - ability to inspect books and liable for losses likely = partner

4. **View/sharing of profit** - intent to make profit - usually that intention unless non-profit assoc, clubs, soc
- Advantages**
Establishment - informal/inexpensive: minimal formalities compared to companies - self regulation.
Ways of creating partnership:
 In writing - document terms and conditions and regulate activities of partners thru written
 Oral agreement - drawback - lack of evidence
 Inferred through conduct - evidence may show partnership relationship even though not labelled that way [eg. label as JV when actions same as in partnership
 Partnership by estoppel - prevents going back on certain things - s14 Partnership Act - actual partner tells someone they're a partner [so they know] and they don't deny it means you're legally prevented from denying and possible to attract liability as a partner
Fundraising - more than sole-trader up to 20 partners in a trading partnership / non-professional but can be more eg. up to 1000 for accounting firms. Cannot raise equity
Tax - no partnership tax and tax benefits for venture capital and limited partnerships. Does have to lodge a tax return for checking purposes but individual pay tax in their own returns
Financial secrecy - fins accts of partnership don't have to publish like companies

Disadvantages
Unlimited Liability - everyone is liable although there can be **limited partnership** [just one person has to be a general partner to bear all liability while the rest has limited liability to the amount of contribution to the partnership BUT can't be mmgt else lose limited liab [not popular since taxed same as company, but at least company has mmgt and ALL limited liab or **venture capital limited partnership** [Limited partnership which is formed to invest in small startup businesses with exceptional growth potential]

Agency - each partner is agency/principal to another - commit other partners to debts - still bound if someone else gets a debt
Joint liability for contracts - if outsider sues firms - all partners jointly liable for debt

Joint and several liability for tort - plaintiff can target who to sue or collectively sue entire firm [if its one partner sued they'll try seeking compensation from the firm [but internal matter]

Limited Life - new partners can be entered but it has its acct expenses/tax

Incorporation of Companies

Business carried on by **Smith v Anderson** - trust was investor and more than 20 other people were holders of trust certificates. Each trust holder had the right to choose trustees who had restricted rights of mmgt. Issue: trust or partnership? Smith said it was actually an illegal partnership with more than 20 people. Conclusion: no a partnership - isolated act being undertaken w/ no repeat of venture. Key point: - carrying on of business- Carried on - Griffin Case
 If isolated transaction but with intent to have several transactions then that's carrying on a business

In common - Checker Taxicab - driver hired taxi car w/ contract for it to be returned in good condition after each use. Driver paid running exp of car with agreed percent of earnings - rental. Issue: dispute about relationship btwn owner of car/garage and driver
 Decision: not partnership - not a business carried on by persons in common. NOT in common. Two diff biz w/o control and mutual rights/obligations.
 In common - Keith Murphy
 WA builder and prop owner agreed to share profits after dev/selling land. Builder agreed to build on land and be liable for building costs but no meetings held nor common bank acct nor fiduciary relship.
 Conclusion: common interest not enough for partnership

Establishment of partnership - Rule 1: Co-ownership of property : **Davis v Davis**
 Two bro inherit equal shares as tenants in common of a biz and 3 houses. The sons continued to manage the biz but not in formal partnership agreement. Each withdrew money from biz weekly and offered homes as security to the bank pursuant to a loan agreement but then defaulted.
 Issue: was the biz relationship a partnership and were the houses included as partnership property
 Conclusion: yes - courts inferred brothers carrying on a biz in common with view of profit since each withdrew same amount of money weekly

Establishment of partnership: Rule 2: Sharing of gross returns: **Cribb v kom**
 Cribb supply land and equip; rano supply labour and share gross proceeds equally. Mt. kom hired and injured and sued both cribb and rano alleging they were partners Issue: Partnership or tenancy agreement
 Conclusion: no because though sharing gross returns - clear not intend partnership since - arrangement = lease/license of prop where Rano made payment as % based on gross return of product produced and sold by Rano and Rano worked only on his own behalf paying Cribb rent. Also not in common since lack of mutual rights/obligations between them

Payment of interest - creditor CAN outstep boundaries and be a partnership Megavand v Delhasse
 Delhasse lent 10000 pounds to Megavand for use in their partnership with entitlement to share in profits/losses to extent of 25%
 Express part saying it was a loan not a partnership.
 However Delhasse could examine partnership books when he chose, received quarterly statement, make further loans on equiv terms and terminate arrangement by notice in certain cases.
 10000 pounds was the only capital of the business.
 Issue: When bankruptcy, Delhasse lodged creditor claim for 10000 debt which was rejected because he was a partner. Creditor or partner?
 Conclusion: Partner because Delhasse had all the rights of dormant biz partner

1. Right to control prop -> 10000 pounds only capital
 2. Right to receive profits -> share in profit 25%
 3. Liability to share in losses -> share in profit AND LOSSES - 25%
 Loan mere pretence

limited liability to the amount of the fully paid share. if its not fully paid you owe the amount you owe

Mercantile Credit
 Liability -> power of partner to bind the firm ->
 1. There must be transaction of the kind carrying on the firm:
 Gamod and Perkin conducted biz in partnership and gamod was less active in daily mmgt. Partnership agreement prohibits buying/selling cars as part of the partnership biz but Perkin breached it and trad sold a car [that didn't belong to him] to third party [Mercantile Credit] who sued both for refund of purch price
 Issue: can gamod be sued to recover even though perkin breached? Yes -- sale of car in scope of garage's normal biz and Perkin had apparent authority to transact

control of benefit of beneficiary
Advantages
Diff types eg. Discretionary trust - identify/interest of beneficiary isn't determined at creation of trust so trustee can pick who/proportion of income each to take [usually a way to tax minimise]

• **TAXATION** - trust income EITHER assessed on trustee's or if FULLY DISTRO then is beneficiary tax rate [but not both] thus incentive to fully distribute
Disadvantages
Formalities - can be complex/expensive compared to alt
 Control/mmgt - trustee = legal owner and control/mmge for beneficiary

• **Liability** - trustee liable for debts but entitled to be indemnified out of trust assets [reimbursed]
Fiduciary duties to beneficiary - honesty, trust and good faith
Duration - rule against perpetuities so not forever

Trading trusts
 Created when trustee conducts biz on behalf of beneficiaries
 2 dollar companies - represents the shares in the company since before 1995 - law needed min. 2 ppl to form a co and most family biz want to incorporate so issued shares to value of \$1 each All directors lose is value of inv in company i.e. \$2 tho company may have \$20m debt - but down side is limited liability might not exist - eg. reckless [s197 can take it away]

Parent and subsidiary companies
Co = sub if holding/parent co[s46-50] test:
 • Controls composition of board of directors
 • Controls > 1/2 of the votes
 • Holds > 1/2 issued share capital

Lots of corp groups do use group structure and have diff groups
 • Basic - parent/sub
 • Conglomerates - complex - eg. BHP w/ 300 controlled entities or News Corp with > 750 controlled entities
 • Popularity due to SLE which applies to all entities - thus why popular -- treated separate by law even though same group and allows co to quarantine risk

Not really advantage since need to prepare for creditors - to get a loan
Distinction btwn small & large ptv Co
 Classification isn't fixed. Small ptv could become large and vice versa
Tested each financial year to see if s45A crit satisfied ->

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- **Advantages**
- **Separate Legal Entity [SLE]** - important privilege that can be taken away
- **Limited liability** - insulate personal wealth [co limited by shares]
- **Perpetual succession** - ability to go on forever - co dies when dereg
- **Can sue/be sued in co name**[co cost not yours -linked to lim. Liab]/hold assets in co name
- Able to purchase shelf company
- Free transferability of interests through market - ASX [public co only]
- Grant floating charge over its assets [type of security they can offer]
- **Greater finance/mmgt skill sources** Can have >20 members for ptv and unlim for public
- **Taxation** - sepeate taxpayer = pay income tax at lower marginal rate than indie

Disadvantages
Establishment formalities - reforms [2007] reduced corp fees to \$400 and company constitution optional now. Co is reg upon issue of certificate of reg by ASIC [s118 & 1274(7A)] after app form [s117] lodged. However that takes a few weeks so if want instant company - buy a shelf/ready-made company. Co after 1998 can adopt internal mmgt rules in Corp Act /replaceable rules/ or prepare own constitution or combo of both unless no liab co [s134]. **Post-incorp req:** appointment of secretary[public]/auditor [public and large ptv only], maintenance of register of members, minute books, fins records and a registered office

- **Continuous admin obligations/professional fees/public law obligations** - ALL sanctions in corp act, ASIC not self reg like partnership
- **Lack of fins secrecy** - need to maintain records, public disclosure
- **Control** - risk that by issuing shares, control will be diluted and lost control. If you want safeguard then pick ptv.

Small and Large Pty Co: and Pty and Public Co differences

Small Pty	Large Pty	Public Co	JV OR partnership - UDC Ltd Udc, Brian and spl in jv. Prior to forming jv, udc and spl entered contract involving proceeds of future jv if spl failed to repay money lent by udc. Brian unaware of this contract. udc took all the profits and relied on the previous contract as spl failed to repay. Brian alleged this breached fiduciary relationship btwn jv though jv agreement said they were jv not partners. Issue: fiduciary or not even tho in jv? Conclusion: yes so udc had to pay brian its share. There was a partnership "a fiduciary relationship exists where prospective partners who have embarked upon conduct of partnership biz/ventures before precise terms of any prtnership agreement have been settled."
<p>Doesn't have to:</p> <ul style="list-style-type: none"> - Prepare P&L a/c, B/S [292(1)] - Appoint auditor - Lodge fins stmts w/ ASIC <p>BUT statutory exceptions:</p> <ul style="list-style-type: none"> - If ASIC demands fins statements then need to be prepared - OR - required by S/H w/ >5% voting shares <p><i>Not really advantage since need to prepare for creditors - to get a loan</i></p> <p>Distinction btwn small & large ptv Co Classification isn't fixed. Small ptv could become large and vice versa Tested each financial year to see if s45A crit satisfied -></p>	<ul style="list-style-type: none"> • Pty - [s113] - 1. Max = 50 members 2. Can't raise money conducting public offer of securities • Pty exempt from AGM • Diff in min. no. of directors <ul style="list-style-type: none"> o 1 in ptv • Fundraising difference ^ • Yes financial secrecy <p>Distinction btwn small & large ptv Co Classification isn't fixed. Small ptv could become large and vice versa Tested each financial year to see if s45A crit satisfied -></p>	<ul style="list-style-type: none"> • Public [s9] 1. Unlimited members 2. Can raise equity from general public- conduct public offer of securities - issue disclosure doc • Difference in name [pty ltd v ltd] (s148-149) • AGM: s250N • Min. no. of directors: s201A <ul style="list-style-type: none"> o 3 in public • Fundraising s113 (3) • No Financial secrecy • Deals with other people's money • Greater disclosure/supervision under ASIC than ptv • Tends to be listed in ASX [can have unlisted but no common since asx = marketplace w/ benefits of liquidity] 	
<p>Payment of interest - creditor CAN outstep boundaries and be a partnership Megavand v Delhasse Delhasse lent 10000 pounds to Megavand for use in their partnership with entitlement to share in profits/losses to extent of 25% Express part saying it was a loan not a partnership. However Delhasse could examine partnership books when he chose, received quarterly statement, make further loans on equiv terms and terminate arrangement by notice in certain cases. 10000 pounds was the only capital of the business. Issue: When bankruptcy, Delhasse lodged creditor claim for 10000 debt which was rejected because he was a partner. Creditor or partner? Conclusion: Partner because Delhasse had all the rights of dormant biz partner</p>	<p>Parent and subsidiary companies Co = sub if holding/parent co[s46-50] test: • Controls composition of board of directors • Controls > 1/2 of the votes • Holds > 1/2 issued share capital</p>	<p>Small and Large Pty Co: and Pty and Public Co differences</p>	<p>JV OR partnership - UDC Ltd Udc, Brian and spl in jv. Prior to forming jv, udc and spl entered contract involving proceeds of future jv if spl failed to repay money lent by udc. Brian unaware of this contract. udc took all the profits and relied on the previous contract as spl failed to repay. Brian alleged this breached fiduciary relationship btwn jv though jv agreement said they were jv not partners. Issue: fiduciary or not even tho in jv? Conclusion: yes so udc had to pay brian its share. There was a partnership "a fiduciary relationship exists where prospective partners who have embarked upon conduct of partnership biz/ventures before precise terms of any prtnership agreement have been settled."</p>