

Week 1

Over-arching themes

Consider these themes throughout the course for every type of organisation/charity/association

Formation

- How can it be formed?
- Requirements?
- State v federal based registration?
- Company –needs to register with ASIC and is federally regulated v a cooperative needs to register with the office of fair trading, which is state regulated

Property

- Can this form of association hold property in its own right?
- Issue of incorporation (if the entity is a separate legal personality, then it can hold property in its own name/right, contrast with unincorporated association – it cant, because it does not have a separate legal personality, so it is usually held on trust for the benefit of the members of the association).

Rights of members

- Who are the members of a company?
- What are they called? A: shareholders. Shareholders have lots of rights. Members of unincorporated non for profit association don't have many rights

Relations with outsiders

- How does the association relate to outsiders – e.g. can it form a contract?
- Who can outsiders claim against?
- Separate legal entities can be sued, can individual members be sued?
- Who is liable? Normally it would be the committee members if they have control over operations

Public accountability

- Does the association have... for example, reporting requirements? Corporations do depending on their size

Dispute resolution

- Does the association have a process for dispute resolution – which will depend on the associations rules

Dissolution

- How does the association come to an end
- What happens to property held on trust – if its unincorporated, can it be distributed?

Legal concepts

- Fiduciary relationships – duties

- Holding property on trust
- Contractual relations
- Good faith and reasonableness – joint venturers owe each other a duty of good faith, also significant in franchises
- Unconscionability
- Incorporation
- Agency

Incorporation

The act of setting up an artificial entity which is recognised by the law as a **legal person with rights and liabilities separate from its members.**

- **Creates a legal person, separate legal entity but it must act through its agents.**

For example – a company has separate rights to its shareholders

Creates an artificial legal person which is a **separate legal entity**

From T Guigni reading:

“ A company has its own legal rights and responsibilities, quite apart from those who own or run it, and this is a fundamental concept with which all students of business and law must come to terms.” (p304)

Unincorporated v Incorporated

Incorporated associations	Unincorporated associations
Have a separate legal personality	Have no separate legal personality
Can sue and be sued in their own name	Cannot sue or be sued
Can enter into contracts	Cannot enter into contracts

Advantages of incorporation

- Limited liability for members
- Can hold property in its own name

Disadvantages

- A lot of formalities and requirements for registration and also for public accountability

Agency

Definition:

Agency is a legal relationship existing between two parties whereby one (the Agent; A) is authorised by the other (the Principal; P) to do, on the P’s behalf, certain act(s) which effect the P’s rights and duties in relation to Third Parties (3P).

‘Agency is a word used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties.’

-International Harvester Co of Australia Pty Ltd v Carrigan’s Hazeldene Pastoral Co (1958) 100 CLR 644 at 653:

Facts:

- Carrigan was at a trade show and saw a harvester machine
- People at the store directed him to the local dealer, described as the local agent
- Goes to the agent, buys the harvester

- Tries to sue the manufacturer – because he thinks the manufacturer is the principal and the dealer is the agent

Held:

- Local agent wasn't actually an agent under the law, just a term used in a business sense
- Because the local agent had purchased the harvester in their own right and were selling it in their own right
- They weren't an agent selling for the manufacturer
- So therefore, Carrigan only had a relationship with the dealer
- Just because the term agent is used, doesn't mean they are actually an agent, must look at the nature of the relationship

Creation of Agency

Agency relationship usually created to bring about a contractual relationship between a principal and a third party.

Legal relationship of agency can be created by....

Contract – Creation of Agency by Agreement

- Express or implied agency created either orally and/or in writing

Ratification

- Where the agent acted outside their authority, but the principal retroactively authorises the act

Operation of law

- Necessity e.g. directors of companies

Estoppel / Holding Out

- Principal's conduct creates the impression of agency which 3P **relies on**

Authority

P is only bound by acts that are done by A that are **within the scope of A's authority**

But... there are different types of authority

1) Actual Authority

- P **expressly** or **impliedly** gives A authority to act in a particular way – ***Freeman & Lockyer v Buckhurst Park Properties (Mangal)Ltd [1964] 2 QB 480 at 502***
- **Express actual authority**

Authority the principal has expressly given the agent in words or writing.

- **Implied actual authority**

In addition to express authority, the agent may have a further *implied* authority to do whatever is necessarily incidental to carrying out the principal's express instructions.

e.g. principal authorises agent to purchase shares – agent has implied actual authority to do everything in the usual course of business to complete the transaction

Where a person employs a particular type of agent to carry out some act on behalf of the principal, the agent will have such implied authority as agents of that class normally have – ***Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549 at 583***

Where the agent's authority has not be consented to or limited, e.g. where board of directors limits a MD's authority – agent will not have implied authority to the extent of the limitation. **HOWEVER** – apparent authority may then apply if 3P reasonably believes agent has authority.

- Must ask 2 questions:
 1. What did the agent have actual authority to do? (express or implied)
 2. Did their actions fall within the scope of the authority
- Once the court decides that actual authority exists, they will then determine if the actual acts relied upon **fall within the scope of that authority.**

2) Apparent / Ostensible Authority

- The authority of an agent as it appears to others – ***Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549 at 583*** per Lord Denning
- Arises when P represents to 3P that A has authority to act on their behalf in a particular matter/certain way – even if they don't.
- All about - how does the situation appear to outsiders? The reasonable impression a third party might get from the situation
- P still bound by acts of an agent which fall within the scope of the agent's apparent authority – even though agent may have acted outside of their actual authority
- Easier for third parties to prove apparent authority than actual

Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd [1971] 2 QB 711 – hire car case

Facts:

- A company secretary hired cars, told the car company that they were for picking up important clients and to invoice the company. However, he used the cars personally (not for company use at all) and had not been authorised by the company to hire the cars – no actual authority.

Held:

- Company secretary (due to the nature of that position and how it appeared to outsiders) had ostensible authority to enter into such agreements and, as such, the company was liable for the debts incurred. Letterhead used etc.
- Note:
 - o Measure of reasonableness – was it reasonable for 3P to believe A had the requisite authority?

Fiduciary Duties of an Agent

The agency relationship is a fiduciary one and the agent must always act in good faith for the P. As such, agents have the following duties:

1. Must always act in P's interests – unless full disclosure and consent

Dargusch v Sherley Investments Pty Ltd [1970] Qd R 338

Any profit received by the agent resulting from non-disclosure is recoverable by the principal – *Walden Properties Ltd v Beaver Properties Pty Ltd [1973] 2 NSWLR 815*

2. Must make full disclosure of any personal interest

Corporations Act 2001 s 191 – Director of a company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest.

Agent can act for seller and vendor, but must get consent from both -

3. Must not make a secret profit or commission

Parker v McKenna (1874) 10 Ch App 96

S 183 – a person who obtains information because they are or have been a director must not improperly use the information to gain an advantage for themselves or someone else or to cause detriment to the corporation.

4. Must give personal attention to P (cannot delegate responsibility)

Usually an agent has no authority to delegate their duties to another. However, this has been relaxed in business so, the authority of an agent may be implied in the following situations:

- Where by the usage of trade an agent usually acts through other agents

- Where the duties to be performed by the agent are purely ministerial and do not involve the exercise of any discretion or skill, e.g. collecting rents.
- Where from the nature of the transaction it is clear that the parties intended, or may be reasonably presumed to have known, that it might be necessary to act through a sub-agent.
- Where unforeseen circumstances arise which necessitate the agent delegating. The necessity must be urgent and the sub-agent must be appointed with discretion.

5. Must follow P's instructions

Failure to comply (except when it is illegal) will render the agent liable for the loss suffered by the principal as a result of the breach

6. Must exercise due care, skill and diligence

Mitor Investments Pty Ltd v General Accident Fire & life assurance Corp [1984] WAR 365 – Insurance agent didn't get cover for sea flooding and didn't exercise due care and skill.

7. Must account for all transactions

8. Duty to act in good faith

Relationship with 3rd Parties

Name of Principal Disclosed

Where acting within authority, A is not liable to 3P

If acting outside of authority: **breach of warranty of authority** – liable to 3P for damages

Existence, but not name, of Principal is disclosed

Generally the same as above – as long as the agent *contracts as agent* (may be altered by trade/custom)

Relationship with 3rd Parties

Doctrine of Undisclosed Principal

- Agent contracts in their own name without expressly contracting as agent or disclosing the existence of agency
- Agent becomes personally liable
- If 3P becomes aware of agency, may elect to hold either the agent or principal liable on the contract (not both).

Abigroup Contractors Pty Ltd v Peninsula Balmain Pty Ltd [2001] NSWSC752

If Agent Fails to Pay

Burden is on the Principal

3P pays money to A (for P)

P is deemed to have received the money and is bound at that point – cannot charge again

P provides payment to A (for 3P)

Payment has *not* been provided to 3P and therefore P must pay again (unless statute intervenes)

Principal can then pursue the agent, but that is the principal's burden

Termination of agency relationship

By action:

- Performance of contract/duties
- Mutual agreement
- Revocation of A's authority

By law:

- Death
- Insanity
- Bankruptcy

Agent compared to Trustee

Agent	Trustee
Gets authority from principal	Gets authority from settlor
Principal benefits	Beneficiaries benefit
No personal liability (if acting within authority)	Can be personally liable
Binds principal	Cannot bind beneficiaries
Limited by capacity of principal	Limited by trust deed
Owes fiduciary duty to principal	Owes fiduciary duty to beneficiaries

Freeman & Lockyer v Buckhurst Park Properties [1964] 2 QB 480 – MD who wasn't appointed

Facts:

- Kapoor entered into a contract for purchase of land – but didn't have enough funds
- Entered into another person for them to pay additional funds
- Set up a company which would own property and appointed themselves as directors
- Kapoor acted as MD (managing director) with knowledge of the board, but hadn't been properly appointed
- Kapoor engages architects who performed work
- Company argues Kapoor acted without authority – and he should be personally liable

Held:

- No actual authority – wasn't appointed
- But, by allowing Kapoor to act as MD, company had created apparent (ostensible) authority
- Kapoor's actions in appointing architects was within the normal scope of MD's work.

Crabtree-Vickers Pty Ltd v Australian Direct mail advertising & addressing Co Pty Ltd (1975) 133 CLR 72

Facts:

- Appellant argued that they had entered into an agreement to sell a printing press to the Respondent
- Bruce Jr was Managing Director
- Peter was no longer a director, but still an employee of the firm
- Order form was signed by Peter per Bruce Jr
- However, Bruce Jr's powers were limited – could not make purchasing decisions without consent of the board if they were expensive
- Bruce jr did not have actual authority to enter into the contract, and peter didn't have authority as an agent

Held:

- Because bruce jr didn't have actual authority, therefore he could not give peter apparent authority
- Someone who doesn't have actual authority – couldn't give someone apparent authority
- HC: Accept TJ finding that there was no actual authority given to Peter to enter into the contract. Also accepted TJ finding that there was no ostensible authority either.
- Bruce Jr did not have actual authority as there was a restriction on his power. If Bruce Jr had ostensible authority he could give Peter actual authority to enter into the contract. But he did not.

- "...a person with no actual, but only ostensible, authority to do an act or to make a representation cannot make a representation which may be relied on as giving a further agent an ostensible authority." (para 17)
- bruce jr could not brand peter as an agent with apparent authority
- bruce jr was not aware of peter's actions – so couldn't give him authority
- **general rule: person with apparent authority could grant an agent actual authority and it would have been binding**
- **person with apparent authority cannot grant another person apparent authority**
- **no binding contract!!**

Who is liable in these circumstances?

1. A **3P** knows they are dealing with an **A** (acting within scope of authority) but does not know the identify of the **P**.

Principal is liable.

2. A **3P** believes they are dealing with a **P** but in fact they are dealing with an **A** within the scope of her authority.

Agent – because they don't know the principal exists

Principles liable as well

3. A **3P** believes they are dealing with a **P** but in fact they are dealing with an **A** acting wholly outside the scope of her authority.

Agent is liable. Because its outside the scope

4. A **3P** reasonably believes they are dealing with an **A** acting within her authority but in fact they are dealing with an **A** acting outside the scope of her express or implied authority

Apparent authority exists here. Because its about appearance to a third party

5. A **3P** knows they are dealing with an **A** but are unsure or have no reason to believe the dealing falls within the scope of the authority of that **A** (which in fact it does not).

Agent is liable.

6. A person holds himself out as an **A** for a firm to which they have no actual relationship at all.

Agent is liable

Types of Associations & Business Structures

- Non-Profit
 - o Unincorporated
 - o Incorporated
- Charities
- Partnerships
- Joint Ventures
- Franchises
- Companies
- Cooperatives

	Nature and structure	Establishment	Taxation/liability	Dissolution
Sole trader (not	<ul style="list-style-type: none"> • One owner with complete control 	<ul style="list-style-type: none"> • Register business 	<ul style="list-style-type: none"> • Individual is liable and will pay 	<ul style="list-style-type: none"> • Lasts as long as

covered)	<ul style="list-style-type: none"> Owner and business are not separate legal entities 	<p>name</p> <ul style="list-style-type: none"> Registration does not give exclusive right to use the name 	<p>individual's income tax (company rates do not apply)</p> <ul style="list-style-type: none"> ABN is required from ATO 	<p>the owner wants it too</p> <ul style="list-style-type: none"> Death or retirement = end
Non-profit	<ul style="list-style-type: none"> Groups or persons formed or carried on for any lawful purpose that does not result in the members making any profit for themselves or dividing any property among themselves unless the association ends Based on consensus and agreement, not contract (cf partnerships) 	<ul style="list-style-type: none"> Establish own rules No profit or gain for individual members Not a separate legal entity (unless incorporated) Property held by trustees for use of current members 	<ul style="list-style-type: none"> Committee members are liable for debts (unless incorporated) Members rights traditionally not legally enforceable 	<ul style="list-style-type: none"> As per the rules of the association
Charities	<ul style="list-style-type: none"> Established for purposes that the law regards as charitable The Charities Act 2013 (Cth) lists charitable purposes under section 12 (1) as including: <ul style="list-style-type: none"> Advancing health Advancing education Advancing social or public welfare Advancing religion Advancing culture It is not-for-profit It has all charitable purposes (other than ancillary or 	<ul style="list-style-type: none"> Need to register with ACNC 	<ul style="list-style-type: none"> Special exemptions for tax if it is a charitable purpose 	<ul style="list-style-type: none">