CHAPTER 4

Participants in the Industry

[4.10] The primary focus of legal considerations for the construction industry is with the contract itself. There are, however, many participants and organisations involved in the contract worthy of mention in a legal context. This chapter concerns those parties, consultants and other bodies, and the different legal entities and organisations which are commonly encountered in the construction industry.

Quite apart from the construction industry organisations referred to here, many other parties will likely have a key role in the formation and delivery of construction contracts, including lawyers and financiers. A detailed consideration of these specific roles is, however, beyond the scope of this text.

KEY PARTIES TO CONSTRUCTION CONTRACTS

Principal

[4.20] The principal, as the entity which procures the work or services, is the party without whom there can be no project and therefore no contract. For the sake of convenience in this text, the term "client" has been adopted in situations involving the relationship with architects and engineers and the term "principal" in matters concerning the project or contract generally. This party may also be referred to by various other terms, such as the "employer" (this is the term usually found in forms derived from England, including those of the Joint Contracts Tribunal (JCT) and International Federation of Consulting Engineers (FIDIC)), the "proprietor" or building "owner".

As a legal entity, the principal may be one or more than one individual, a partnership, a corporation, an unincorporated association or a government or statutory body. The interests of owners of commercial premises are represented in the industry through the Property Council of Australia (PCA). The PCA (formerly, as the Building Owners and Managers' Association of Australia) participated in the preparation of earlier editions of AS 2124 and the now redundant JCC Building Works Contracts but did not participate in the drafting of subsequent Standards Australia general conditions or the Australian Building Industry Contract (ABIC) series. Instead, the PCA published its own form, the Project Contract PC-1 (and associated subcontract, PSC-1), in 1998.[1]

1. As to these, and other standard forms of contract, see Chapter 10.

Traditionally, client organisations have been in a powerful position to dictate both the conditions of engagement of consultants and the conditions of contract which are to apply; naturally, the strength of this position varies from time to time as market conditions fluctuate.

Government bodies

[4.30] Apart from their role of regulation and control, government bodies at all levels have a major role in the construction industry as the client or principal under construction contracts. Government bodies exist in a variety of forms, from the departments and organisations run by public servants to independent statutory corporations. A fully independent statutory corporation has a separate legal personality like a company, may sue and be sued in its own right and has the ability to make contracts. The legal freedom and accountability of such a corporation will be prescribed in the statute which created it, and the limits of its activities and procedures must be observed for transactions made by it to be valid. Similarly, the legal rights of any government office or officer should be prescribed.

Although the Crown's historical immunity from prosecution has generally been removed by statute, many advantages continue to be enjoyed by government bodies. First, the organisations may not be bound by the same laws and regulations which bind the public. There is a presumption that the Crown is not bound by an Act or regulation unless there is an express or necessarily implied provision to that effect. It was held, for example, that the Housing Commission of New South Wales was not bound by building ordinances made under the *Local Government Act 1993* (NSW),[2] whereas government organisations are generally bound by the provisions of town planning laws.[3]

Whilst in many instances a government organisation can ignore building regulations and approval procedures, many comply as a matter of convention. Almost invariably, standard forms (see, for example, clause 11.1 of AS 4000-1997) require that the contractor comply with requirements of all Acts, regulations and ordinances, so that almost inevitably non-compliance will be unlikely.

Secondly, there are procedural advantages enjoyed by the Crown and government bodies in proceedings against them. They may, subject to freedom of information legislation, have the right to claim privilege for documents that are of high government or administrative importance. Actions against government bodies are often subject to shorter periods of limitation and may require special notice before commencing proceedings.

2. See *North Sydney Municipal Council v Housing Commission* (1948) 48 SR (NSW) 281 and *McNamara (McGrath) v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646; 221 ALR 285.
3. But see *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143.

Whilst the same principles of substantive law apply to government contracts as to any other, it has traditionally been the case that, in general, government bodies have a bargaining advantage arising from the use of standard-form contracts which contractors must accept and which contain terms weighted in favour of the principal. This advantage is reflected in the standard forms of contract adopted by government bodies over many years, such as the (now defunct) National Public Works Council (NPWC) series of contracts. Following the abandonment by Standards Australia of the recent AS 11000 general conditions project, the Australian Procurement and Construction Council and Austroads prepared a new set of general conditions, NCW4,[4] based broadly on the last edition of AS 2124. In New South Wales, the influence of government in the adoption of a different approach to contracting is very evident in the standard form GC21 Construction Contract which is used for many projects. The emphasis in this form of contract is on "co-operative contracting".[5] Further, the employment of expert determination as the principal method for dispute resolution under this contract form has had an impact on the use of arbitration, at least in New South Wales.[6]

Statutes may require contracts with the Crown to be in particular forms or to have particular formality. There are also statutory restrictions and controls upon tendering procedures by government bodies, and Codes of Practice for Tendering have been developed by many such bodies, in addition to generally applicable Codes.[7]

Contractor

[4.40] The person or entity who carries out the building or engineering work is the contractor. They may also be called the "builder", the "building contractor" or the "engineering contractor". The method adopted for the construction contract may be one of numerous alternatives: see, generally, Chapter 8.

The historical concept of builders as the people undertaking all the work necessary to erect a building using their direct employees has largely been replaced with the concept of a contractor who is primarily a broker employing only supervisory staff and engaging sub-contractors and suppliers for the various elements of the work.

A further development has been the role of the construction management contractor who provides management and supervisory services for the execution of all of the work by sub-contractors or trade contractors. In a

4. See [10.70].
5. See [8.140], [10.30] ff.
6. See, further, [14.390].
7. See, eg, the Commonwealth Procurement Rules (2018) https://www.finance.gov.au/procurement/procurement-policy-and-guidance/ and State Government procurement policies and procedures.

construction management arrangement, sub-contractors and suppliers are engaged directly by the principal and are therefore designated "trade contractors".

In all States and Territories, legislation requires registration or licensing of builders, particularly for residential contracts or work.[8] Although the consumer protection principle behind this legislation is similar, there are substantial differences in detail, which are frequently amended and the analysis of which is beyond the scope of this text.

A number of bodies represent the interests of contractors. The Master Builders' Associations (MBA) in each State and Territory and the national body, Master Builders Australia, have existed for many years and have been involved in the preparation of many standard form contracts, including the AS 4000 and ABIC series. In addition, the Australian Constructors Association has been formed as a representative body for Australia's leading contractors, with the aims of improving efficiency and competition and to encourage industry-wide reform. The Australasian Procurement and Construction Council provides support for government in the establishment of procurement procedures and with Austroads have published new general conditions of contract, NCW4 2018, for use by government bodies. The Australian Industry Group represents a wide range of industry groups including the construction industry.

The residential building sector is represented nationally by the Housing Industry Association (HIA) with State/Territory and regional bodies servicing a wide range of participants in the industry. There are a range of HIA standard form contracts and supporting publications. The Australian Institute of Building represents building and construction professionals with Chapters in each State and Territory (other, currently, than the Northern Territory) and in Hong Kong.

The principal and the contractor are the main parties to the building or engineering contract, often called the "head" or "main" contract. There may be other persons associated with a contract, but they are not parties to it and, unless an exception to the doctrine of privity applies,[9] acquire no rights under it.

Sub-contractors

[4.50] The "head" or "main" contract will usually regulate the sub-contracting of parts of the work by the contractor, or for the performance of specific work by sub-contractors nominated or selected by the principal. Unless the contract provides otherwise, neither of these arrangements alters

8. See [3.50] and [3.70]-[3.80].
9. See [5.360].

the overall responsibility of the contractor nor creates a contractual link between the principal and the sub-contractor.[10]

The sub-contract may be for the supply of labour only, the supply of labour and materials or for the supply of materials and goods only. As noted above, in construction management contracts, the trade contract (otherwise a sub-contract) is made directly with the principal.

The representation of construction industry subcontractors is fragmented and to a degree operates under state organisations, for example, the Australian Subcontractors Association based in South Australia.[11] In the past the main body representing sub-contractors was the Building Industry Specialist Contractors Organisation of Australia (BISCOA), which participated in the preparation of companion sub-contract forms for use with the standard main contract forms. Other specialist associations exist to represent members of various trades.[12]

The fragmentation of the construction industry subcontractor associations across Australia has to some extent affected their capacity to effect robust representation and support for this sector within the industry. Problems of payment and the risks associated with insolvency have been recognised in the 2015 Report of the Senate Economic References Committee *"I just want to be paid"*.[13]

CONSULTANTS

[4.60] Architects, engineers and other consultants may be engaged in a variety of roles on construction projects. They may be the principal consultant responsible for a project, or may act as a specialist or secondary consultant. They may be appointed directly by the client, or may be appointed by the principal consultant or contractor responsible for the whole of the professional advice required for the project (for example, under a design and construct delivery method – see [8.80]). The mode of appointment has important consequences to the chain of professional responsibility.[14]

Under "traditional" forms of construction procurement,[15] the multiple roles which may be undertaken by an architect or engineer include:

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10. As to subcontracting generally, see [8.200]-[8.310].
11. http://www.asaonline.org.au/.
12. For example the National Fire Industry Association (NFIA), the Air-Conditioning & Mechanical Contractors Association (AMCA) and the primarily State based Master Plumbers and Electricians associations.
13. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Report.
14. See Chapter 11 as to professional liability generally. Detailed advisory notes on roles and appointments are available to architects via Acumen (see Chapter 3 n 19).
15. This is where the design is prepared by, or on behalf of the principal: see [8.70].

- responsibility for design and documentation prior to the entry into the construction contract; and
- contract administrator or superintendent during project execution; whilst the nature of the responsibility will be as spelled out in the construction contract, it will usually involve a dual role as agent of the principal and independent certifier.[16]

Many other consultants may be engaged to provide specialised technical services including quantity surveyors, acoustic, geotechnical and landscape consultants. Such consultants may be engaged by the client, the principal consultant architect or engineer, or by the contractor. There has developed a process for the provision of consulting services whereby the principal consultant is a project manager or management consultant, having the overall responsibility, but possibly not the legal liability, for co-ordination and execution of the project.[17]

Beyond this "inner circle" of consultants directly involved in the project, there is often a range of other advisers by one of more of the parties, including insurance brokers, financial advisers, accountants and lawyers.

Architects

[4.70] The architect is usually involved throughout the course of a project, including design, documentation and administration of the construction contracts, and also provides a wide range of consulting and advisory services.

As was noted at [3.220], the term "architect" is restricted by the various State and Territory *Architects Acts* (in South Australia, the *Architectural Practice Act 2009*) to those registered with the respective boards, and penalties may be applied for its misuse.[18] These boards prescribe the necessary academic qualification, practical experience and the content of any architectural practice examination required for registration. The National Standard of Competency for Architects is published by the Architects Accreditation council of Australia. Whilst registrations may be effected in any State or Territory, the terms of the *Mutual Recognition Act 1992* (Cth), as amended in 2017, means that an entitlement to registration in other States and Territories is created.

The main professional body representing architects is the Australian Institute of Architects (AIA – formerly the Royal Australian Institute of Architects), which operates as a Chapter in each State and Territory and by a federal council. In addition, there is the Association of Consulting Architects Australia (ACA), which primarily represents architects in private

16. These roles, and the overlap between them, are often misunderstood: see, further, [11.60].
17. But, see *McPhee & Sons (Aust) Pty Ltd v Technopolis Pty Ltd* (1996) 13 BCL 189 and *Macquarie Bank Ltd v Meinhardt (NSW) Ltd* [2010] NSWSC 1320.
18. See also [11.30].

practice. The Association of Professional Architects (APA) represents architects as employees and is a division of Professions Australia, formerly the Association of Professional Engineers, Scientists and Managers, Australia (APESMA).

The AIA has been involved in the preparation of many standard form contracts, ABIC in particular. Its Practice Division has developed an on-line professional advisory service, Acumen,[19] which has absorbed and consolidated the former extensive Advisory Notes on matters of practice, law and management, and other valuable guides. The AIA also has standard forms of Conditions of Engagement and Client/Architect Agreements for use by architects[20] and Fee Guidelines for the assistance of architects and clients.

Engineers

[4.80] Most building projects will involve the services of engineers in a range of disciplines. Engineers may be involved with expertise in various fields including civil, structural, mechanical, electrical and hydraulic systems; on a large project, each may be responsible for a different part of the design or other types of advice.

Engineers are often engaged as secondary consultants to the architect, appointed by the architect, the client or the contractor directly. Where the engineer is engaged as principal consultant, they will remain responsible for the co-ordination of the work of the consultant engineers, including the activities involved in the contract administration stage. On the other hand, in major industrial and engineering projects, the principal consultant will often be an engineer.

Use of the term "engineer" is not restricted in the same way as the term "architect".[21]

Engineers Australia (formerly the Institution of Engineers, Australia) is the main professional body of engineers. Other organisations concerned with the practice of engineering, the conditions of engagement and professional fees are Consult Australia (formerly the Association of Consulting Engineers, Australia (ACEA)) representing those engineers in private practice, and Professions Australia, formerly the APESMA, representing employee professional engineers. See also [3.220].

Quantity surveyors

[4.90] The principal functions of a quantity surveyor are measurement of the quantities of the separate sections of the work, preparation of a bill of quantities (where applicable – see [8.120]) and the provision of measurements and

19. See Chapter 3 n 19.
20. See [10.110].
21. Except in Queensland: *Professional Engineers Act 2002* (Qld). See also [11.40].

valuations during the course of the contract. They are commonly engaged by clients and financiers. The quantity surveyor in recent years has developed an additional role as a building cost consultant and economic adviser to clients and architects.

The professional body representing quantity surveyors is the Australian Institute of Quantity Surveyors. It has for many years published the *Australian Standard Method of Measurement*.[22]

Other technical consultants

[4.100] With the rising complexity and technical specialisation of the construction industry, there is an increasing demand for new and different specialist consultants. Acoustic specialists, landscape architects, interior designers and computer programming consultants are but a few of these.

UNIONS

[4.110] Employment in the building and construction industry remains organised largely on the basis of unionised employees, despite the increasing use of sub-contract labour and the significant reforms to industrial relations laws in recent years.[23]

One of the problems in industrial relations has traditionally been the multiplicity of unions. This has applied as much to the construction industry as it did to other industries, and the problem has been exacerbated by the dual systems of industrial relations requiring the dual registration of bodies and separate Federal and State/Territory administration of these bodies. Most unions in the construction industry operate wholly within the industry; however, others are centred outside but have members who participate within the industry.

The largest union is the Construction, Forestry, Mining and Energy Union (CFMEU) which operates in all States and Territories and covers many of the building trades. It is an amalgamation of the former Building Workers' Industrial Union (BWIU) and the Federated Engine Drivers' and Firemen's Association (FEDFA). In March 2018 the Fair Work Commission, see [3.240], approved a further amalgamation of the CFMEU with the Maritime Union of Australia (MUA) and the Textile, Clothing and Footwork Union of Australia (TCFUA).

The Australian Workers' Union (AWU) also operates across the country and generally covers non-tradespersons, predominantly in mining and civil engineering projects. The Australian Manufacturing Workers' Union (AMWU) also has some involvement in the industry. A number of unions which formerly represented individual crafts (including electricians and plumbers)

22. https://www.aiqs.com.au/imis/AIQS_Website/News/ASMM6.aspx.
23. See [3.240].

are now represented under the national umbrella of the Communications, Electrical and Plumbing Union of Australia (CEPU).

The ACTU (Australian Council of Trade Unions) is the main national body representing trade unions. It acts in most situations as the spokesperson for the union movement as a whole and takes responsibility for the preparation and presentation of major cases before the Australian Industrial Relations Commission and more recently Fair Work Australia. The Building and Construction Industry Award, in its various forms, was the product of this process. There are similar national organisations for white-collar and public service unions.

Since the mid-1970s, and partly as a result of the amalgamation of unions into the CFMEU, a national approach to awards for the construction industry has developed. The Award covered all on-site tradesmen except plumbers and dealt with a number of unions apart from the CFMEU. It replaced numerous State-based awards which previously applied and has provided a vehicle for national uniformity and stability.

CORPORATE STRUCTURES

[4.120] The entities comprising the principal, contractor, sub-contractors and consultants may take many different legal forms. They may, as often occurs in residential work, be individuals. They may be partnerships, as is often the case in small consultant organisations. Alternatively, they may be companies. The principles of law set out in this text will be applicable to participants in the construction industry no matter in which form they exist. There are, however, special considerations with respect to the legal capacity and liability of forms other than the individual which will be dealt with briefly here. Where the organisation carries on business under a name other than the usual names of its members, the name must be registered under the applicable State or Territory *Business Names Act*. The Registrars of Business Names have a wide discretion to refuse registration of names which could be confusing or undesirable, and the use of certain names is prohibited under the *Corporations Act*. Registration usually lasts for three years and is renewable.

The most common organisation among contractors and principals is the limited liability company. Architects and engineers in Australia may practise as a limited liability company, though in smaller practices partnerships are more common. In some circumstances the principal may be an unincorporated association, or a non-profit incorporated association.

Companies

Forms and liabilities

[4.130] Companies (or corporations) may be formed in a number of ways, but the form most often encountered is the limited liability company incorporated under the *Corporations Act* of the Commonwealth. This is the form which is considered in the following section.

Company law was constitutionally a matter retained by the States. Historically, this made uniform national regulation of companies difficult to achieve within the Federal legislative structure. However, commencing with the passing of the *Corporations Act 1989* (Cth), such uniformity has been achieved. In 1991, the Commonwealth *Corporations Law* replaced the former Co-operative Companies and Securities Scheme (known as the *Companies Code*) which operated by means of ostensibly uniform legislation administered by the States and Territories.

A significant further step was taken in 2001. As a result of the States and Territories agreeing to refer to the Commonwealth the bulk of their legislative power in respect of company law, the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) were passed. The Australian Securities and Investments Commission (ASIC) is the sole administering authority for companies throughout Australia.[24]

The essential characteristic of a limited liability company is that it exists as a separate legal entity, apart from its members (shareholders). The limit of its liability is to the value of the shares in the company. Companies may also be limited by guarantee; may be unlimited in their liability (as is a partnership); or be a non-liability company. A limited liability company acquires its assets from the contributions of its members, who acquire shares in the company. The liability of the shareholders will be limited to the nominal value of the shares that they hold. The assets and debts from its operations belong to the company rather than its members. It is not unusual, however, to find that financial institutions require personal guarantees from promoters and directors of limited liability companies before extensive credit will be advanced. The company may enter contracts, and generally only the company can sue or be sued on those contracts. Any contract entered into by promoters of a company before incorporation formerly were not binding or ratifiable by the company but may now be ratified under certain circumstances.

If a wrong is done by or to a company, the company itself is the proper party to an action. Even where one person beneficially holds all the shares (that is, the "one-person" company), the person does not have standing to sue on his or her own behalf for a loss resulting from the wrong done to the company. Subject to some limitations arising from its artificial character and limitations placed on its activities by its own constitution and the *Corporations Act*, the company may have the same rights, powers and obligations as a "natural person" (that is, an individual). However, its legal personality created on incorporation has perpetual succession, with its existence, rights and obligations continuing undisturbed until it is wound up.

24. See, further, [3.40].

A company limited by shares may be either a "public" or a "proprietary" (private or "Pty Ltd") company. Public companies have shares which are freely transferable, and they are able to invite the public to subscribe for shares and lend debenture capital. A proprietary company may not make public flotations, and the transfer of its shares is restricted. For those reasons they are not as strictly regulated as, and have privileges and advantages over, public companies.

Whilst it is possible, as noted above, for architects, engineers and some other professionals to practise as a limited liability company, they may not by this device escape personal liability for their own acts and omissions. A provision in the company's constituent documents or in a contract which exempts or indemnifies an officer of the company from liability which attaches to that person for matters with respect to the company is invalid. The company would incur liability for breaches of contract and negligence arising under the contract, whilst the architect or engineer director of the company may be liable in tort for negligence based on their own acts or omissions. The company itself can and should take out professional indemnity insurance, with consideration being given to appropriate run-off cover after the firm ceases trading.[25]

Formation

[4.140] A company comes into existence when ASIC issues a certificate of incorporation. This is done after the Commission has examined and approved the information on the application form (including any required documents) and the appropriate fees are paid. The formation of public companies is more strictly regulated, including by any securities exchange on which their shares are traded such as the Australian Securities Exchange (ASX Limited), particularly in relation to invitations to the public to subscribe to shares and to lend debenture capital.

There are a number of ways in which the finance for a company may be raised. A proprietary limited company will be financed from a restricted private group whereas a person, including another company, may invest in a public company. The usual method is by the issue of shares, and the share capital raised generally cannot be returned to the members. Many different classes of shares exist, each with different rights to dividends, voting and priority in the return of capital and distribution of assets in a dissolution of the company.

As an alternative to issuing shares, the company may borrow money by way of secured or unsecured loans. When the company obtains a secured loan the document acknowledging the indebtedness is called a "debenture". Debentures may be secured by way of a mortgage over specific property or assets of the company or by a "floating charge" which applies to the whole of the company's assets. Such secured creditors have priority over unsecured

25. See [12.130] ff.

creditors and the members of the company in a dissolution. The value of the company's assets may fluctuate, as will the value of shares.

Any person may be a member of a company, but the company may not buy its own shares or the shares of its holding company. Members are under a liability to pay the whole nominal amount of the shares allotted to them and may be "called" so to do where the company wishes to fully raise the value of its issued shares.

Management

[4.150] Because a company is an artificial entity, its actions are performed by its human agents. The company is usually run by the directors who are the principal agents of the company. Whilst in theory the members in general meeting are superior, in fact the Board of Directors is usually authorised by the company's constitution to exercise most of the powers of the company with only certain matters reserved to be determined by the members in general meeting. The company must appoint directors who may or may not be members though the constitution may often require a minimum holding for directors.

The *Corporations Act* includes many provisions which regulate the duties and liabilities of directors and protect shareholders against directors, minority shareholders against directors and minority shareholders against majority shareholders. There are also provisions which render directors personally liable for debts unreasonably and knowingly incurred by the company when the company was, in effect, insolvent.

The directors stand in a fiduciary relationship with the company and must act in the interests of the company as a whole, disclosing any special personal interests they may have in dealings with and by the company. Directors must act with reasonable care and skill in performing acts on behalf of the company, though they may delegate certain duties to employees of the company. Whilst the liability of the members is limited, directors may be personally liable for breach of duty, negligence or fraud. There are also provisions which extend the directors' fiduciary duty, particularly concerning "insider trading" and the use by themselves or others of confidential information gained as directors.

Individual members have rights to give notice of, and have matters of importance discussed, at general meetings. The directors also have the power to call other meetings called "extraordinary general meetings" where urgent matters may be resolved which cannot wait until a general meeting. The *Corporations Act* makes it compulsory for public companies (unless they only have one member) to hold Annual General Meetings. These normally deal with matters such as accounts, dividends, appointment of directors and other matters of importance.

The *Corporations Act* and the *Competition and Consumer Act 2010* (Cth) exert extensive legislative control over takeovers to guard against foreign ownership and control and reduced competition. These provisions also require disclosure of the company proposing the takeover, the proposal itself, the current prospects of their own company and any interests of their directors in the proposal.

Winding up

[4.160] A company may exist for an unlimited period of time and does so irrespective of changes in the composition of its members or directors. Circumstances may, however, arise which make it desirable to terminate the company's existence. A solvent company may be wound up or de-registered when the purpose for which it was formed has been accomplished (for example, a "special purpose vehicle" consortium of firms which is formed to undertake an infrastructure project). A more usual situation is where the company is insolvent and either voluntary or involuntary winding up is sought. There are intermediate procedures which might be adopted other than winding up, such as the appointment of an administrator or a receiver to the company.

The winding up process involves the legal termination of the corporate entity and the distribution of the assets to those entitled. It is conducted by the liquidator who is the person appointed, by the members or creditors in a voluntary winding up, or by the court in an involuntary or compulsory winding up. In general the authority of the directors is terminated and the business is carried on by the liquidator only for the purpose of the effective collection and disposal of the assets in the winding up. The liquidator may maintain or commence actions on behalf of the company, or defend proceedings against the company.

The most common ground for applications for winding up is insolvency, generally made on the application of the company or the creditors of the company. The crucial requirement for winding up on the grounds of insolvency is that the company is in fact insolvent.[26] The *Corporations Act* provides that a company is presumed to be insolvent, unless proved otherwise, in several circumstances the most usual being the failure to comply with a statutory demand within the time prescribed.[27]

There are a number of other grounds for winding up by the Court including a special resolution of the company to do so, certain applications by ASIC and applications by members based on oppressive or unfair conduct.

The *Corporations Act* also prescribes the priority or order of payment of debts of a company.[28] Formerly, the Commonwealth could claim priority for any debt to it, but now the Commonwealth ranks with other unsecured creditors,

26. *Corporations Act* ss 459A-459D.
27. *Corporations Act* ss 459E-459F.
28. *Corporations Act* s 556.

though the directors of the company may be personally liable for any loss of taxation revenue.

The liquidator has power to recoup money paid under voidable transactions entered into by the company to the disadvantage of the company and its creditors within certain prescribed periods prior to the liquidation. Voidable transactions include unfair preferences,[29] uncommercial transactions[30] and unfair loans by the company. The foreshadowed Commonwealth "ipso facto" reforms may impact upon the contractual provisions which allow payments by the Principal following the termination of a contract based upon the insolvency of the contractor: see [7.380] which considers the possible impact of the introduction of the *Personal Property Securities Act 2009* (Cth) to payment procedures under contracts.

Unincorporated associations

[4.170] An "unincorporated association" is a term which describes a group of persons who are neither a company nor a partnership but who act together as a club for religious, sporting, social or political purposes.

Difficulties arise when such a group wishes to enter a contract. It may not be precisely clear who are intended to be the parties to the contract and who may be liable for debts and obligations under it. The members of the association may appoint a committee to conduct the affairs of the association, including the entering of contracts. Depending upon the authority granted to the committee by the other members, the committee members may be liable personally for the contract or the members of the association may be jointly liable.

All States and Territories have legislation (generally known as *Associations Incorporation Acts*) designed specifically for the incorporation of non-profit associations. These laws provide a simple and inexpensive method by which religious, sporting and social organisations may limit the liability of their members and their committee members.

It is not unusual for such an association to be the principal or client in a construction contract, for example to design or build a new clubhouse or church. The matters which must be considered before contracting include the constitution of the association, the authority of the committee members signing the contract, and whether there is an adequate common fund allocated by the members for the performance of the contract.

Partnerships

[4.180] A partnership is a "relationship which subsists between persons carrying on a business in common with a view to profit". Whilst it will

29. *Corporations Act* s 588FC.
30. *Corporations Act* s 588FB.

not be difficult to determine that a company exists, it may be difficult to determine whether or not a partnership exists. As with a company, there is often a written constitution and partnership agreement, though partnerships may be established orally or even inferred from the dealings of the parties.

The principles of the law of partnership have been codified in the State and Territory *Partnership Acts* which are to a great extent identical. The Acts set out the matters which are indicia of the existence of a partnership. These include joint ownership of property, the sharing of profits and the advancing of a loan. The terms of the *Partnership Act* will apply unless overridden by the actual terms of the parties' partnership agreement.

No particular form of partnership agreement is generally prescribed, and the parties may make whatever arrangements they wish among themselves so long as they are within the parameters of the legislation. It is usual to have a written agreement which sets down such things as:

- the names of the partners
- the nature of the business
- terms concerning capital contributions
- authority of the partners
- the division of profits and capital on dissolution
- drawings by the partners
- the effect of the death, insolvency or retirement of a partner.

The *Corporations Act* limits the number of partners to 20 except in certain professional partnerships where there may be as many as 1,000 for accountants. For architects the limit is 100.

Liabilities

[4.190] A partnership is not a separate legal entity as is a company. Each partner is individually liable for the obligations of the firm incurred during his or her membership of the firm, to an unlimited extent. In most of the States and Territories there is legislative provision for limited partnerships, though it is rarely used. The reasons for this include that partners cannot take any part in the management of the firm.

Partners will all be liable for the obligations incurred and liabilities that arise from the actions of the partners in the normal course of the partnership business. Where the liability arises under contract or debt, the partners are jointly liable so that they should all be sued either in their own names or in the name of the firm.

A creditor may bring an action against any one partner and recover judgment against that partner, thereby discharging the other partners. Where the liability arises in tort, however, the partners are jointly and severally liable;

however, the firm itself may have the benefit of proportionate liability.[31] Thus a plaintiff may sue the firm or any of the partners and, if judgment is unsatisfied against those sued, may bring further actions against the others until full satisfaction is achieved. For the co-partners to be liable for a wrongful act of the partner, it must have occurred "in the ordinary course" of the partnership business or have been authorised by them.

Management

[4.200] Each partner is the agent of the other partners of the firm, and, subject to agreement to the contrary, every partner may take part in the management of the firm. The partners may agree to limit the extent to which a partner may independently bind the others. The agreement will usually authorise a limited number of partners to make management decisions and require unanimous agreement for other decisions such as admitting a new partner. A partner, in participating in the management of the partnership, must exercise due diligence, care and skill. Partnership property may be used only for the partnership business.

The relationship among partners is one of "utmost good faith" (*uberrimae fidei*). Thus, all partners must account for any benefit derived from any transaction concerning the partnership made without the consent of the other partners and are bound to disclose their interests in matters affecting the partnership.

The capital of the firm is contributed by the partners and the extent of their holding in the firm may be in any agreed proportions. One partner may contribute only capital, and another may contribute only skill and effort. The partners may agree to share profits in many different proportions and usually share losses in the same proportions. In the absence of agreement, the *Partnership Act* will imply equal share in profits and liabilities for losses irrespective of capital contribution. The partnership agreement and the business affairs and accounts of the firm are not required to be disclosed to the public, though the true identity of the partners where not in the name of the firm often must be disclosed.

Other advantages of a partnership lie with the simplicity and informality with which it can be formed, the fact that it is not a separate legal entity and that it is not in itself a taxpayer (although the partners will pay tax on the distributed profits). The firm will be liable for payroll tax, sales tax and stamp duty arising from its business operations.

Dissolution

[4.210] Partnerships may be dissolved or terminated in a number of different ways. In the absence of a special agreement, a partnership ceases on the

31. See, generally, [6.310].

death, bankruptcy or retirement of one of the partners. The agreement may provide for the firm to be carried on in such circumstances by the surviving or remaining partners. The partnership may also be dissolved by the lapse of time if made initially only for a limited period, or on the completion of the enterprise for which it was formed.

Where provision is made in the partnership constitution for the retirement, replacement or addition of a partner, the business of the firm may continue, but it will be a different firm from the original. The *Partnership Acts* accordingly require that such changes be publicised. Contracts entered into prior to the dissolution will continue to bind the partners unless provision is made for release.

Dissolution is the first step to the winding up of a partnership. The partners' authority and obligations may continue thereafter only for the purposes of winding up and to complete existing contracts. The partnership agreement should make provision for such things as the valuation of goodwill where the business is to continue and the distribution of assets on final settlement after the payment of creditors.