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Navigating complex ownership structures

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Recent decision

- *Brittain v Mansour* [2013] VSC 50





Who is the proprietor?

- Food Act definitions
- *Proprietor*
 - proprietor of a food business means- (a) the person carrying on the food business; or (b) if that person cannot be identified, the person in charge of the food business
- *Person*
 - person includes a body or association (corporate or unincorporate) and a partnership;





Different corporate structures

- No separate legal entity
 - Individual
 - Partnership
 - Unincorporated association

- Separate legal entity
 - Company
 - Trust
 - Incorporated association





Company

- Separate legal entity
- Can sue or be sued
- Can hold assets in its own name
- Can have 1 or more directors
- Directors also liable
 - Section 51 – bodies corporate





Associations

- Can be incorporated or unincorporated
 - Unincorporated
 - Will not have “Inc” or “Ltd” after name
 - Group of individuals that come together to further a common interest, without forming any legally recognised structure
 - Can not own property or bring a legal action in the groups name





Associations

- Unincorporated Association cont.

- All members liable
- Section 52 Food Act states:

Where this Act provides that a person, being a partnership or an unincorporated body or association, is guilty of an offence, that reference to the person shall:

(b) in the case of an unincorporated body or association – be read as a reference to each member of the committee of management of the body or association





Associations

■ Incorporated Association

- Incorporated under the *Associations Incorporation Act 1981 (Vic)*
- Separate legal entity – can hold assets and property in its own name, can sue and be sued
- Will usually have “Inc” at the end of name
- Restricted to operating in Victoria
- Has a public officer and a committee
- Has members





Partnerships

- An association of individuals or entities for the purpose of carrying on a business in common with a view to profit
- Not a separate legal entity – assets and liabilities are owned and owed by the partners jointly
- Regulated by *Partnership Act 1958*





Partnerships

- Joint and several liability – each partner is fully liable to third parties
- Section 52 Food Act states

Where this Act provides that a person, being a partnership or an unincorporated body or association, is guilty of an offence, that reference to the person shall:

(a) in the case of a partnership – be read as a reference to each member





Trusts

- Complex area of law
- Holder of a legal or equitable interest in certain property is bound by an equitable obligation to hold his or her interest in that property not for his or her own exclusive benefit, but for the benefit as to the whole or part of such interest for another person





Trusts

- No separate legal existence
- All transactions undertaken by trustee – trustee can be a company or an individual
- Trustee is personally liable - can be sued
- It is often not necessary to disclose the fact that a trust is in existence for most commercial transactions
 - If trustee is a company, trust may simply trade under a company umbrella





Business name

- Also known as trading name
- From 28 May 2012, must be registered with ASIC (previously, it was CAV)
- Proprietors of the business name are personally liable





Case study 1

- Food premises – warehouse/distributors
- Council records:
 - Registered proprietor – “The Kylie Walsh Family Trust”
 - Business trading name – “KMS”
 - Renewal form – signed by a “director”
 - Certificate of registration issued to “The Kylie Walsh Family Trust”





Case study 1 cont.

- Business name search – “KMS”
 - No business name “KMS”
 - Registered business name with same address “KMS Distributors”
 - Business name “owned” by: KMS Trading Pty Ltd





Case study 1 cont.

- Company search of “KMS Trading Pty Ltd” revealed:
 - that the company was currently registered with ASIC; and
 - there were 3 directors of the Company (one of these was the same as the person who signed the renewal form as “director”)
- It may be that the Company is the trustee for the trust, but registration should have been granted to KMS Trading Pty Ltd as trustee for “The Kylie Walsh Family Trust” or the company in its own right





Case study 2

- Food premises – warehouse
- Council records:
 - Registered proprietor – “Kylie’s Outdoor Catering Pty Ltd” (certificate of registration issued to same)
 - Business trading name – “Orlando Outdoor Catering” (“Orlando” is the name of a large international franchise chain)





Case study 2 cont.

- Investigation revealed:
 - Interview with representative of franchisor
 - Q 3 - Franchisee is Kylie's Catering Pty Ltd with Kylie Walsh and Mathew Sherwell being the directors
 - Q 15 Franchisee is "Kylie's Function Catering Pty Ltd"





Case study 2 cont.

- Investigation revealed:
 - Interview with two individuals
 - Mathew Sherwell says he is in a partnership with Kylie Walsh and says he is a director of “Kylie’s Outdoor Catering Pty Ltd” (turns out he is not)
 - Kylie Walsh admits she is a director of “Kylie’s Outdoor Catering Pty Ltd”





Case study 2 cont.

- Business name search of “Orlando Outdoor Catering”
 - Revealed had not been registered since 2005
- Company search of “Kylie’s Outdoor Catering Pty Ltd”
 - Revealed registered, but only one director (Kylie, not Mathew)





Key messages

- Take notice when registering and renewing food premises
- Take care when investigating complex ownership structures
 - Make sure entities are legal entities and have current registration
- Remember that the proprietor of a food business is not always going to be the person or entity registered with Council





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