

What is a Partnership?

A partnership is not an entity – it is merely a form of shared ownership of property and an agreement to share certain benefits and obligations.

There are 2 types of partnership:

1. General law partnership: a relationship between parties carrying on a business with a view to a profit.
2. Tax law partnership: For income tax purposes, a partnership not only includes the general law definition of partnership, but also includes persons in receipt of ordinary or statutory income jointly (i.e., together).

What factors are used to determine whether a partnership exists?

Where taxpayers receive income jointly, this is clearly a partnership for tax purposes.

However, whether a general law partnership exists (i.e., parties carrying on business together) is more difficult to show as it is a question of fact. The existence or absence of a partnership agreement is not conclusive evidence of an intention (or a lack of intention) to act as partners. However, a partnership agreement normally provides pretty good evidence that the parties intend to be in partnership (although this may not be enough).

The ATO takes a number of factors into account in determining whether a partnership exists, but if one or two are missing it does not mean a partnership does not exist.

Advantages of a partnership

The main advantage of a partnership is simplicity. Other advantages are:

- ◆ Less costly to establish than a company or a trust;
- ◆ Inexpensive to run;
- ◆ Easy to understand;
- ◆ Can provide some flexibility in the partnership agreement; and
- ◆ Income splitting between partners;

Disadvantages of a partnership

The main disadvantages of a partnership are:

- ◆ The partners are jointly and severally liable (i.e., each partner is liable not only for their share of the partnership debts but also for those of the other partners. At worst, one partner can be liable for the entire partnership's debts);
- ◆ Generally no asset protection; and
- ◆ Some tax disadvantages.

Features of NTAA Corporate's Partnership Agreement

This partnership agreement is the "basic" agreement, designed for a partnership of individuals (as opposed to the more complex "Partnership of Trusts" agreement).

The following are some of the features of NTAA Corporate's Partnership Agreement, most of which are common to many such agreements. However, the agreement should be read in full to fully ascertain the relationship between the partners.

- ◆ If the partners intend to trade under a name which is different to their own personal names (taken together), they will need to register that business name with the authority responsible for registering business names in the relevant state or territory.
- ◆ Cheques made out from the partnership's bank account must be signed by the number of partners specified in the schedule. The partners can agree on other methods of signing cheques, including

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specifying that they must be signed by specific individuals, and should work this out with their bank.

- ◆ Each partner's initial interest in the partnership is specified as a percentage in the schedule. This will generally be calculated by reference to the capital contribution of each partner, but the interest is the same with respect to both the income and capital of the partnership. For example, if the partner has a 50% interest in the partnership, the partner is entitled to 50% of the income (or loss) of the partnership and has a 50% interest in the assets of the partnership. The partners can agree in future if they wish to share income and capital in different proportions.
- ◆ The partners may periodically draw money from the profits of the partnership as and when they agree. If it is found that any drawings for the year exceed the available profit, the partner or partners who overdraw their share may be required to repay that amount to the partnership. The partners may also agree to pay one or more partners a salary from the partnership (although this may give rise to different taxation considerations – speak to your accountant about this).
- ◆ Other amounts owing by a partner to the partnership or by the partnership to a partner may carry interest.
- ◆ Each partner owes certain duties to the partnership and is also prohibited from doing certain things without the consent of the other partners. The partners should be careful of these duties and prohibitions, because the other partners can expel any partner who breaches them.
- ◆ A partner can resign from the partnership by giving at least 3 month's notice to the other partners.
- ◆ The partnership does not come to an end by reason only of a partner leaving or dying, or another partner being added, and the remaining/continuing partners expressly agree that the partnership will continue beyond such an event, unless there is only one partner left or all the partners agree to bring the partnership to an end. If a partner has left the partnership for whatever reason, the other partners may buy that partner's share in the partnership (but if none of them do, the partnership will come to an end in any event).
- ◆ If the partners cannot agree on something or otherwise are in dispute, the dispute must generally first be referred to mediation, and then (if unsuccessful) to arbitration, before they can go to court.
- ◆ No partner can sell or assign his or her interest in the partnership without the prior written consent of all of the other partners.
- ◆ The partners can vary the agreement at any time by all signing a written variation, amendment or further agreement.

Disclaimer

These notes are intended to be a guide only. You should not act solely on the basis of the information contained in these notes because many aspects of the material have been generalised and the tax laws apply differently to different people in different circumstances. Further, as tax laws change frequently, there may have been changes to the law since the notes were written.

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