

Corporation (s57A, s114): a corporation includes a company, any body corporate formed under other legislation and unincorporated bodies that may sue or be sued or hold property in the name of an office holder appointed for that purpose

- s 124(1) – corporations have the legal capacity and powers of an individual and a body corporate
- s 125 – doesn't matter what the company's internal documents say, the company can still do everything (so any contracts entered are still valid)
- Corporations are owned by members/shareholders but are managed by directors
  - Shareholders have a contract with the company so have some rights (vote, attend meetings)
  - In a small company shareholders may also be directors
  - Fiduciary: directors have to act in the best interest of shareholders
  - Directors are the people the company acts through (directors delegate through the company the various tasks that have to be performed)

General Characteristics of Corporations

1. Separate legal entity
  - Company is created by the Corporations Act (artificial) so it must operate through other legal entities (humans)
  - Company is separate from the people who created the corporation (company has its own existence and doesn't depend on the people)
2. Limited liability (most important benefit for corporations)
  - Shareholders/members/directors are not personally liable for company debts BUT:
    - i. s 516: if shareholders have only partly-paid for their shares then they may become liable
    - ii. s 588G: if a company continues trading when it's insolvent (can't pay debts as they fall due) then the directors can become liable
3. Sue or be sued
  - Company can do anything that humans can do
4. Perpetual succession
  - Theoretically, companies can live forever (even if people die, companies are a separate entity) so companies are a really good place to keep your property (companies own the property)
5. Acquire, hold and dispose of property

Corporations vs. Other Business Structures

	<b>Corporations/Company</b>	<b>Sole Trader</b>	<b>Trusts</b>	<b>Partnerships</b>
<b>Definition</b>	See s57A, s114 (does not need to be formed with specific purpose like profit)	One person running a business by themselves	Trustee legally holds trust property (made by settlor) for benefit of beneficiaries (actual owners)*	2+ persons (but ≤ 20) carrying on business in common with a view of profit **
<b>Formation</b>	Registration, ongoing compliance with ASIC, separate entity	Limited formalities, low compliance, not separate legal entity	Complex, expensive, not separate legal entity	Limited formalities, low compliance, not separate legal entity

<b>Liability</b>	Limited (s 516)	Unlimited	Trustee – unlimited Beneficiary – limited to participations	Unlimited
<b>Entitlement to Profits</b>	Company which then goes to shareholders via dividends			Split between the partners (default would be equal share but depends on agreement)
<b>Transfer and Succession</b>	Usually simple (but sometimes need approval if there are few shareholders)	Difficult	Complex and subject to trust conditions	Complex and requires consent from other partners
<b>Permanence of Structure</b>	Perpetual succession because it's a separate legal entity			Can be dissolved if partners retire, die or declare bankruptcy
<b>Management</b>	Directors (appointed by shareholders)	Individual	Trustee	Managing partner (but every partner can take part in it)
<b>Capacity for Growth</b>	Max 50 non-employee members			Max 20 partners (s 115)
<b>Fundraising and Capital Raising</b>	Easy if it's a listed company (if not listed, must ask for a loan from bank)	Depends on person's assets and ability to borrow/pay off loan	Difficult cause banks know trustee must work in the interest of beneficiary	Depends on each partner's assets, liabilities, wealth and ability to borrow
<b>Tax Implications</b>	Company tax rate (30% but 27.5% for companies with a turnover of 10m)	Marginal income tax rate	Trustee: top marginal rate Beneficiary: individual marginal rates	Each partner pays individual marginal tax rates

\* Common law recognises trustee as actual owner while equity recognises beneficiary as actual owner. Trustee owes fiduciary duty to beneficiary

\*\* Equity says every partner owes every other partner fiduciary duties (imposed on people by the law of equity)

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General Liability of Promoters and People Entering Pre-Registration Contracts

A promoter is a person or people who together cause the company to come into existence

- They have absolute power over the company while they are creating it
  - Promoters owe fiduciary duties to the company because promoters have absolute power over the company while they are creating it
  - These duties include acting in good faith and not having own conflict with personal and company's benefit

- There is no clear idea of when a person becomes a promoter and when they stop being a promoter
  - Many promoters go on to become directors
  - Directors owe fiduciary duties to the company
- People acting merely in a professional capacity (e.g. lawyers or accountants) on behalf of a promoter are not considered promoters
- Undertakes to form company / takes necessary steps
  - *Twycross v Grant (1877)* → a promoter is “one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose”
- Involved in formation – active / passive investor
  - Active – a person who actively undertakes the formation of a company by carrying out the procedure necessary for incorporation as a promoter
  - Passive – don’t actively do anything but profit from the other promoters
  - *Tracy v Mandalay (1953)* → land was purchased with the intention to build a property on it but the land was sold to a new company (Mandalay), still having the intention to build a property. People bought shares of Mandalay to buy flats but the flats were never built. Mandalay brought action against the promoters of the land but the argument was, who were the promoters? The court ruled that there were active promoters while others were passive
- Fiduciary obligations of promoters to the company:
  - Relationship of trust (weaker party trusts stronger party to act in their best interests)
    - Act in company’s best interests (acting in good faith to the company and people in the company)
    - Avoid conflicts of interest
- Obligations taken when creating a company:
  - Interest in contract
    - *Erlanger v New Sombrero (1878)* → an organisation bought an island as they thought it had some valuable minerals. A company was then formed with the purpose of purchasing the island off the organisation. It was found that the new director of the company (who was nominated by the organisation and who had signed a contract buying the land) bought the island was worth considerably less than what it had been bought for. This meant that the promoters have made a very large profit to the detriment of the company and its shareholders. The court said that the promoters were not acting on its fiduciary duties and hadn’t disclosed to an independent board of directors so the contract could be rescinded
  - Undisclosed profit
    - Disclose interest to independent board of directors or shareholders of the new company
    - *Gluckstein v Barnes (1900)* → promoters did a deal with one of the creditors of the company and got a discount in relation to the amount of money owed regarding land. They disclosed some but not all of the profit they had made
- Promoters’ Duty of Disclosure

- Must disclose to:
  - independent board of directors
  - otherwise – shareholders (if there is no independent board of directors’ cause promoters take on role of director)
    - but often there is no independent board of shareholders either
  - **Chapter 6D**: prospectus disclosure
- Remedies for breach by promoters:
  - Rescission (undo contract – put other party in original decision and vice versa)
    - Must be done by innocent party which, in this situation, is the promoted company
    - Doesn’t work if there is a 3<sup>rd</sup> party in interest
  - Recovery/account of profit (equitable remedy)
    - Can still get this even if contract isn’t rescinded
    - Must find the amount of profit gained by the promoters and this amount will then be transferred to the promoted company (this can occur even if innocent party doesn't rescind)
  - Damages (some wrong doing on the part of the promoters)

### **Pre-incorporation Contracts**

- The contract is entered into before incorporation
- Entering into a contract although the company doesn’t exist yet (via promoter)
- General law
  - **Kelner v Baxter (1866)**
    - Unformed company could not have agent
    - Ratification not possible
    - No liability for contracting on company’s behalf
    - Novation only (a way of making a contract today as though it was entered into 2 weeks ago)
      - Enter into a new contract on the terms of a contract previously entered in to
      - Parties can agree to any terms they want to – if parties agree that the contract began 2 weeks ago, as long as this is legal (e.g. doesn’t have a way to reduce tax) then they can do it
- Statute
  - **s 133**: replaces general law (completely overrules other law)
  - **s 131(1)**: company bound if contract ratified within time frame agreed or if no time is agreed then within a reasonable time
    - Person is the promoter (pre-incorporation contract signed by promoter)
    - Company must be reasonably identifiable, registered and ratifies the contract (when it is incorporated)
  - **s 131(2)**: person (promoter) entering contract is liable if no ratification/doesn’t enter into a substitute for it
    - Ratification must be within time frame agreed or if no time is agreed then within a reasonable time

- Promoter is liable to the pre-registration contract
- If principle adopts the act of the promoter who entered into the contract, the company can ratify (but if it does it becomes a party to that contract)
- This section protects the 3rd party
- s 131(3): if proceedings are brought to recover damages, the court may do anything that it considers appropriate, including ordering the company to pay all/part of the damages that the person is liable to pay, transfer property the company received because of the contract to a party of the contract or pay an amount to a party of the contract
  - This part of the law gives the court such wide powers because this section is protecting the promoter (cause promoter may be acting in good faith)
- s 131(4): if the company ratifies the pre-incorporated contract but fails to perform all or part of it, the court may order the promoter to pay all or part of the damages that the company is ordered to pay
- s 132(1): other party may give release
  - Party to the pre-registration contract may release the promoter from all or part of their liability under s 131 by signing a release
  - This is for the benefit of the promoter