

## COMPANY LAW SUMMARY

<p><b>Issue:</b> Which issue(s) are involved in the question? e.g. breach of s151 of the Corporations Act 2001, negligence, conflict of interest</p> <p><b>Rule of Law:</b> What precise legal rule(s) are relevant to the facts? Reference <u>specific sections</u> of the Corporations Act 2001, case law <u>referencing the name of the case and the rule/test applied</u> or company constitution, etc. in order to come to a decision about which legal rules are relevant to the presented case.</p> <p><b>Application of the rule:</b> How do the rules apply to the facts of the problem? e.g. As Fred is the company's managing director, he has a duty to act for a proper purpose and in the best interests of the company pursuant to s181 of the Corporations Act'. 'In my opinion, he breached this duty by returning share capital to his family members, causing the company financial difficulties.</p> <p><b>Conclusion:</b> Reach a resolution: has there been a breach? What further action can they take? Is there anything else they can do? e.g. This means the company is in breach of s 259A (prohibition against self-acquisition) and Fred is liable under s 259F(2) as a person involved in the company's contravention.'</p>	<b>IRAC</b>
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## TYPES OF BUSINESS ASSOCIATIONS (not companies)

<p><b>Unincorporated Associations</b></p> <p>formed to carry out activities — members do NOT aim to make a profit and distribute it. ANY profits must be used for the purpose of the association and cannot be distributed to the members.</p> <p>The association is <b>NOT</b> separate legal entity and thus cannot have the benefit of limited liability. The members can elect a committee to conduct the management of the association — these members that are required to defend any legal proceedings brought against the unincorporated association by someone who has been injured by the activities of the association.</p>	<b>Not-for-profit activities 4-110</b>
<p><b>Incorporated Associations</b></p> <p>Formed under the <i>Associations Incorporations Act</i> of the state/territory in which it operates. Association <b>IS</b> a separate legal entity - benefit of being limited by shares, own property, enter contracts, etc.</p> <p>Cannot incorporate if intending to make a profit.</p>	
<p><b>1. Sole Proprietorship/Trader</b></p> <p>An Individual (one) person carries on the business in their own name. There is NO separation between the business and personal assets or obligations of the person conducting the business. The sole proprietor signs all the contracts relating to the business and is <i>personally liable</i> for all debts.</p> <p>The income generated by the business is the income of the proprietor — is the tax payer and the businesses profits or losses can be offset against the individual's other income.</p>	<b>Types of companies 4-120 to 4-150</b>

<p><b>2. Partnership</b></p> <p><i>General partnership</i></p> <p>"An association of people carrying on a business with a view to a profit". The terms of agreement between two partners is typically recorded in a formal legal document titled "partnership agreement".</p> <p>NOT A SEPARATE <b>LEGAL ENTITY</b> — each partner must own the assets and incur the obligations relating to the partnership's business in their own names.</p> <p>Do NOT have <b>LIMITED LIABILITY</b> — partners are <b>AGENTS</b> for each other. Unless agreed upon otherwise, partners have the right to participate in the management and an equal share of the proceeds. —&gt; if the identity of the partners change then the <b>ORIGINAL PARTNERSHIP IS DISSOLVED</b> and a new one is formed —&gt; transfer of assets and obligations —&gt; needs unanimous consent of <b>ALL</b> partners.</p> <p>Profits and losses are taxable in the hands of the individual partners and can be offset against their other income. NOT taxed as a separate entity.</p> <p>s 115 CA "partnerships with more than 20 partners are not permitted without the consent of the relevant minister". The Corporations Regulations 2001 allows certain businesses to operate with more than 20 partners, such as law and accounting firms.</p> <p><i>Limited Partnership</i></p> <p>—&gt; allows investors who want to contribute to capital and have no say in day-to-day management —&gt; limited liability.</p> <p>Must have <b>ONE</b> general partner who carries out the management and does NOT have limited liability and <b>ONE</b> limited partner who contributes capital. If the limited partner participates in management, their benefit of limited liability is LOST.</p> <p>Taxed like companies.</p> <p><b>3. Joint Ventures</b></p> <p>Is NOT a separate legal entity and the assets and obligations of the venture are those of the venturers personally. The participants respective contributions and entitlements are agreed upon in advance - with specific terms. NOT agents for each other and their liability is not joint and their own.</p> <p><b>4. Trust</b></p> <p>One person is required to hold or invest property for the benefit of another person. The person who holds the property is the <b>trustee</b> and the people who enjoy the profit are the <b>beneficiaries</b>. Not a legal entity — trustees are personally liable for debts incurred by the trust and have the right to be indemnified/reimbursed out of trust assets for the amount of the claim (except if they act in a breach of trust). Not taxable in the hands of the trustee.</p>	<p><b>Types of companies</b> <b>4-120 to 4-150</b></p>
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Sample answer:

#### QUESTION 1

Dino, Egbert and Filbery are the directors of Cool Air Ltd, a company engaged as an air conditioner contractor. They each own 15% of the company's share capital and the rest is held by many small shareholders. Unfortunately, Dino's relationship with Egbert and Filbery has now deteriorated. The **company's business is doing poorly** and the directors disagree about what they should do about it. **Egbert and Filbery decide to sell back all of their shares** to the company. They convene a general meeting of shareholders without giving Dino notice, and with the support of other shareholders, remove Dino as a director. The company also passes a special resolution at this meeting, authorising the company to buy back Egbert and Filbery's shares.

**Advise Dino of any steps he may take in relation to the conduct of Egbert and Filbery.**

Cool Air Ltd is a public company and thus members have the capacity to remove directors using s 203D(1). Furthermore, this section requires the director to be removed, Dino to be informed with a copy of the notice as soon as practicable: s203D(3). s 203D(4) gives Dino the right to put a case to the members to defend his position as a director of Cool Air Ltd.

Not only that as a director and member of the company, Dino must be given a notice of the members' meeting as required in s 249J(1). The fact that he didn't receive any notice of the meeting is a procedural irregularity as defined in s 1322(1). The fact that Dino did not receive notice of the resolution and meeting to remove him as director of Cool Air Ltd did not allow him to make a case to the members to defend his position as director, furthermore, he as he was absent, he could not vote on the resolution. Dino holds 15% of the shares but as this is a large company with a large number of small shareholders, shareholder apathy may give him significant voting power and thus if Dino were aware and present at the meeting, he may have been able to keep his position at the company under s 1322(3). Thus I am of the opinion that Dino has suffered substantial injustice, unlike Poliwka v Heven Holdings Pty Ltd. To reinstate his position as director of the company, Dino has grounds to have the resolution to remove him as director set aside, if he brings the case to court under s 1322(4).

The Filbery and Egbert are also likely to have breached 2 director duties: s 180 and s 181. As directors, they have a duty to the company to carry out decision with reasonable care and diligence as prescribed in s 180(1) and Daniels v AWA and ASIC v Adler. It is apparent that the company's business is doing poorly and thus proposing a selective buy-back of their own shares is not in the a decision made with care and diligence. A selective buy-back would significantly decrease the equity share capital of the company, which is not what a reasonable person would do in their position. Furthermore, for the same reason, a selective buy-back would not be in the best interest of the company or for a proper purpose. Thus F and E have contravened s 181(1), as seen in ASIC v Adler. These contraventions of the act allow Dino to apply for an injunction using s 1324. However, this is not the recommended avenue for Dino to pursue as the courts may not grant him an injunction in his capacity as a member, Mesenberg v Cord.

Also as both these issues are in respect to the company's affairs and the decision are unfairly prejudicial to Dino, see Thomas v Thomas - in Dino's capacity as a member, it is advise that Dino use the oppression remedy to obtain an injunction for reinstating him as a director and preventing the selective share buy-back: s233.