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1. Public or private (pty) company?

Proprietary (private) PTY companies:	Public companies:
s 112: - Limited by shares (shares have restrictions on tradeability) - Unlimited with share capital s 113: - Cannot have more than 50 shareholders	- Limited by shares that are freely tradeable (shares can be listed or unlisted) - Unlimited with share capital - Limited by guarantee - No liability company
Minimum 1 director, who must reside in AU: s 201A(1)	Minimum 3 directors. At least 2 must reside in AU: s 201A(2)
Shareholders can remove directors but this right can be excluded by constitution: s 203C RR	Shareholders have a statutory right to remove directors by resolution in GM: s 203D(1)
Directors can be removed by other directors	Directors cannot be removed by other directors: s 203E
Company can pass resolutions via 'paper meetings' (i.e. a resolution circulated and signed by all shareholders without formal meetings required: s 249A(2))	Must have an AGM: s 250N
Directors can attend meetings and vote on matters in which they have a material personal interest: s 194 RR	Must have an AGM: s 250N
No formal restrictions on related party transactions	Related party transactions must comply with Ch 2E
Cannot raise funds from the public, ie. via any fundraising that would require a Ch6D disclosure document.	
No need for AGM	
"Small proprietary company" (s 45A(2)) does not have to prepare a profit and loss account or balance sheet and doesn't need an auditor. - Can have one shareholder and one director (public needs 3 directors min) - 2/3 below (but less thans) - Part-time employees are just a fraction of a full time employee "Large proprietary company" (s 45A(3)) if 2/3 criteria satisfied <ol style="list-style-type: none"> 1. Consolidated gross operating revenue for financial year of company and entities it controls (if any) equal to or greater than \$25m. 2. The value of the consolidated gross assets at the end of the financial year of the company and entities it controls (if any) is equal to or greater than \$12.5m. 3. The company and entities it controls (if any) have 50 or more employees at end of financial year. 	

s 162: allows for changes of type of Corporation; change in procedures in s 162-3.

Public Companies:

1. Are listed on the stock exchange:

- Shares reflect the risk and the financial status of the company (constrains managerial conduct)
- If a company underperforms because of bad management its share price will fall (takeover likelihood >)

2. Have no limit on the number of shareholders (can have only one)

3. Directorial primacy (*ASIC v Rich*; Austin J stronger business judgment rule defence; friendliness to directors)

4. Greater statutory protection for shareholders

- Greater disclosure – onerous reporting and accounting requirements (auditing)
- Restrictions on self-dealing (**Ch 2E**)
- Less ability to entrench (**s 203D**) – shareholders can remove management

5. Minimum number of directors is 3: **s 201A**

*No liability companies:

- Always public companies. Usually used for highly speculative ventures.
- Members may agree to take shares but their membership does not carry any liability to pay any calls of share capital if the company winds up: **s 254M**

Requirements in **s 112(2)**:

- (a) Must have share capital
- (b) Have adopted a constitution stating its sole objects are mining purposes (**s 9**) and
- (c) Must have no contractual right under its constitution to recover calls made on its shares from a shareholder who fails to pay them.

Proprietary companies

1. Limited to less than **50** shareholders (if more than 50, must become public company): **s 113(1)**

2. The minimum number of directors is 1: **s 201A**

3. Prohibited from activity requiring disclosure to investors under Ch 6D **per s 113(3); s 113(4)** contravention, e.g. raising funds from the public.

4. Less onerous obligations

- No requirement to have an AGM; looser reporting requirements (no need for profit and loss account or balance sheet); no need for an auditor; and no obligation to appoint a secretary: **s 204A**
- No entrenched statutory right for members to remove director; removable by other directors if constitution provides.

5. Large & small proprietary companies (*financial year to financial year): **s 45A**

- Difference: level of disclosure required under **Ch 2M**; while **s286** requires all companies to keep financial records, small proprietary companies generally not required to produce financial reports (unless 5% of shareholders/ASIC requests them): **s 292(2)**

Small proprietary companies must satisfy at least two of [s45A(2); 'large' defined – (3)]

- (a) Consolidated revenue <25m annually
- (b) Value of gross consolidated assets <12.5m by EOFY
- (c) Company and its entities have <50 employees (including part-time employees: **s 45(5)**)

6. Sole person proprietary companies (one director; sole member) sanctioned by CA, subject to provisions.

- **s 198(1)** provides that sole director may exercise all powers of the company
- **s 248B**: director can pass resolution by recording and signing it; regardless of what the company's constitution otherwise provides.

2. Director – (Co cannot be a director but can be on the extended definitions per **Buzzle**).

s 9: (a) a person who:

- (i) Is a **duly appointed** director (18+, reside in Australia, appointed)
- (ii) Is appointed to the position of an alternate director and is acting in that capacity; regardless of the name given to their position; and

(b) Unless contrary intention appears, a person who is not validly appointed as a director but:

- (i) **De-facto director:** They act in the position of a director (flawed appointment); or
- (ii) **Shadow director:** Directors of co/body are accustomed to act in accordance with the person's instructions or wishes.
 - Accustomed means "habitual compliance over time" (**Buzzle**)
 - **Causal connection** between wishes and actions required (**Buzzle**)
 - **Company** can be shadow or de-facto director (e.g. where has effective control): (**Antico**)

De-facto director:

- **(b)(i)** not validly appointed but acts in the position of a director: defect in appointment, disqualification or expiration of tenure but continues to act.
- **Factors:**
 - Exercises "top-level management functions" typically expected of a director (**Austin, Chameleon**)
 - Company size (significant matters may be indeterminate if large co)
 - Internal practices/structure
 - Perception of outsiders (creditors, suppliers, etc.)
 - Has co held out a person as a director? (**Chameleon**)
 - If co A engages a consultant which is also a co B, and that co B acts in position of a director of A, then natural person directors/officers of B may be de-facto directors of co A.

Shadow director:

- **(b)(ii)** directors of co accustomed to act in accordance with a person's instructions or wishes.
 - Directors 'accustomed to act' indicates habitual compliance over time, and must be so of a "governing majority" of the board (**Buzzle**).
 - Must apply a 'but for test' to demonstrate a **causal link** between person's instructions/wishes and D's acts (**Buzzle**).

***Not enough that the person has the commercial power to impose conditions on a company that the board would feel obliged to accept (e.g. a