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Proprietary (Pty Ltd) vs Public (Ltd)

- **Partnership:** no more than 20 members: s 115
- **Large proprietary company:** s45A (50 or more employees)

Issue:	Proprietary (PTY LTD)	Public (LTD)
No. of members/ shareholders	No more than 50 [s113(1)]	At least 1
No. of directors	At least 1 [s201A(1)]	At least 3 [s201A(2)]
Ability to issue shares to the public	Must not offer shares that require Ch 6D disclosure [s113(3)] unless <u>s708</u> applies; Pre-emption [RR s 254D]	Can offer shares when share issue requires disclosure under Ch. 6D; Can offer shares without PDS [s708]
Ability to issue PDS	No [s113(3)]	Yes
Type of company	Company limited by shares; Unlimited with share capital	Company limited by shares; Limited by guarantee; Unlimited with share capital; No liability
Removal of directors by members	Replaceable rule (by resolution) [RR s203C]	Mandatory rule [s203D] (no short notice [s249H(3)])
Removal of directors by directors	Board can remove [RR s203C]	Board cannot remove [s203E]
(Requires a company to notify ASIC [s205B])		
AGM	N.A.	All public co must hold [s250N]
Single director calls a members' meeting	Replaceable Rule	Unlisted company [s249 RR] Listed Company [s249CA]
Notice of members' meeting	21 days or shorter [s249H]	21 days or shorter [s249H(2)]; No short notice for removing public co director [s249H(3)]; 28 days for Listed [s249HA]
Appointing proxy [s 249X]	Replaceable Rule	Mandatory rule
Dividend rights	Subject to <u>s254T</u> and term of which shares to issue [RR s254W(2)]	Same rights for shares in the same class [s 54W(1)]
Financial reporting	Required for large Pty [s292(1)]; Small Pty can request [s292(2)]	Required [s292(1) – disclosing entity]
Give other directors notice of conflict	<u>Not</u> required if other directors are aware [s191(2)(b)]	Formal obligation for directors to give notice [s191(1)]
Vote on matters relating to personal interest	Directors can vote after disclosing interest under s191 [RR s194]	Directors must not be present or vote at board meetings [s195(1)]
Related party transactions	Not applied	Applied

Separate legal entity

Separate legal entity- s 124(1) – Companies (as a separate legal entity) have legal capacity and power of individual

Cases

Salomon v Salomon (Separate legal entity doctrine)

Lee v Lee's Air Farming Ltd (firms can contract with its controlling participants (shareholders/employees))

Macaura v Northern Assurance (Insurance claiming – Company property NOT property of its' participants)

Internal Governance Rules

s134 – Company may be governed by both constitutional terms and replaceable rules

Legal effect of internal governance rules:

s140 – A company's constitution (if any) and the RRs that apply to it have effect **as a contract** between:

- the *company* and each *member* (capacity as a member); or
- the *company* and each *director* and *secretary*; or
- a *member* and each other *member*

Case

Eley v Positive Govt Security Life (not a contract between company and solicitor (who is not a member))

- NOT a breach of the Act; but
- Breach of contract – Contract law for interpretation and remedies (common law remedies – e.g. damages/injunction/set aside resolution)

Altering constitution: s136

1. Company can modify or repeal its constitution: s136(2)
2. Company can adopt a constitution: s136(1)
3. Company can provide further requirements (entrenchment): s136(3)
4. Lodge special resolution notice with ASIC (Public company): s136(5)

All require special resolution: s9

Removal of directors

Public company

- Members can remove directors through an *ordinary resolution* (s203D)
- Members can elect a new director through an *ordinary resolution* (RR s201G)
- A director **cannot** be removed by other directors in public companies (s203E)

Proprietary company

- May remove a director by capacity of another director or member through resolution (RR s203E)

Resignation of directors – s203A

Directors control:

- Alternate director – RR s201K
- Appoint MD (managing director) – RR s201J
- Revoke MD – s203F
- Elect chair of board – s248E
- Disqualification – Part 2D.6

MUST notify ASIC with changes in board composition – s2015B

Calling member's meeting (for a proper purpose)

Members' meetings...

- All public companies *must* hold an annual general meeting (AGM): s250N
- Extraordinary general meetings (EGMs) [varying class rights, appointment of directors, amendments to constitution]

...called by:

- Usually *board of directors*: (s198A); but
- Can also be called by a *single director*; or
 - Pty Ltd company and Unlisted: (RR s249C)
 - Ltd company: (s249CA)
- Court may order on *application by a director or member*: (s249G); or
 - Member with <5% vote
 - Director in unlisted companies whose rights are replaced under s249C
- Requested by *members with at least 5% vote*: s249D; or
 - Directors only call a meeting for **proper purpose** (motive irrelevant) (s249Q)
 - ✓ Proper purpose: vote on the board, change constitutions – *NRMA v Scandrett*
 - ✓ Improper purpose – *NRMA v Parker*
 - ✓ *Not for general management*
- Called by members with more than 50% vote when they request under s249D, but directors failed to call a meeting: s 249E (directors pay for meeting); or
- Directly called by members with at least 5% vote: s249F (members pay for meeting)

Notice

- 1) Notice must be given to all members and directors – s249J
- 2) General rule: *At least 21 days* – s249H(1)
- 3) Short notice: s249H(2) – AGM's where all agree; EGMs where 95% agree
- 4) **No short notice** (at least 21-days) for removing **public company director**: s203D (s 249H(3))
- 5) Listed companies: 28 days – s249HA
- 6) Contents of the notice of meeting: s 249L
 - *Special resolutions* – s 249L(1)(c)

Devereaux Holdings (Notice must *fully and fairly inform and instruct the shareholder about the matter on which he or she will have to vote*)