

Is Your Company's Constitution In Need Of A Health Check?

The Companies Act 2006 ('the Act') was fully implemented on 1 October 2009. The Act is seen as a complete reform of Company Law with the majority of the provisions of the Companies Act 1985 repealed. The overriding objective of the Act is to simplify Company Law.

The Act has introduced numerous changes to Company Law and procedure. One important change is that from 1st October 2009 the prescribed form of articles of association that apply to all companies by default unless altered by a Company's registered articles ("Table A" in the case of a private limited company) are replaced by new Model Articles.

The new Model Articles will however only apply to companies incorporated after 1st October 2009 and a company formed prior to that date will continue to operate in accordance with its existing Articles of Association unless the company's shareholders pass a Special Resolution to alter the company's articles and adopt the new Model Articles.

It is considered that the new Model Articles applicable to Private Companies Limited by Shares are shorter, simpler, written in plain English and likely to be clearer and more user friendly for small businesses. Whilst it would not be encouraged to adopt the Model Articles without the inclusion of further special articles specific to the company's needs, there are clear benefits to the incorporation of these. Some of the benefits include:

- **Objects Clause**

Prior to 1 October 2009 it was a statutory requirement that a company's memorandum of association included an objects clause which stated the purposes for which the company was formed and what it was permitted to do. If a company carried out any activity other than those expressly stated then this would be considered outside of the company's permitted activities and the directors may be potentially liable to a claim for breach of duty.

The Companies Act 2006 dispenses with the requirement for an objects clause and a company's objects are unlimited unless there is a restriction in the company's articles. For companies incorporated prior to 1 October 2009 the objects clause in their memorandum will be deemed to form part of their articles unless the company amends its articles. For general commercial companies that may wish to diversify in the future it would be beneficial to permit the company greater flexibility and it may be appropriate to alter the articles.

- **Authorised Share Capital**

From 1 October 2009 the concept of 'an authorised share capital' is abolished by the Act and a company may issue as many shares as it wishes unless there is a restriction in the articles. The Model Articles will not include any such restriction.

However, for those companies in existence prior to 1st October 2009 the reference to the 'authorised share capital' in the company's memorandum of association will be considered to be such a restriction. The limit may be removed by Ordinary Resolution, however the directors would continue to require the authority of the members to allot the shares unless the new articles are adopted as discussed below.

- **Authority to Allot Shares**

For private companies with only one class of shares, from 1st October 2009 the Directors will not require the authority of the shareholders before issuing the shares unless there is a restriction in the articles. The new Model Articles will not include such a restriction. However, for companies in existence prior to this date there will be such a restriction in the articles and if the company wishes to benefit from this change, the articles would need to be updated.

The rules are different where a company has more than one class of shares and in this case authority of the shareholders by special resolution or by the articles is required.

Consideration in all cases will still need to be given to any pre-emption rights of existing shareholders.

- **Meetings and decision making**

The Act has made substantial changes to the way in which decisions may be made by the directors and shareholders. For example, the Act has dispensed with the requirement of an AGM and private companies can take decisions by written resolution which may be passed by email. The new Model Articles also permit electronic attendance of directors at board meetings.

The Companies Act 2006 has implemented great change to the regulation of Companies. It is not possible to discuss all of these changes in this article and this article is only intended to provide you with a taste of these changes.

If your company was incorporated before 1st October 2009 it is likely that your company's articles of association will need to be updated. We would therefore strongly recommend that you review your Company's constitution in light of the changes implemented by the Companies Act 2006.

Our Commercial Department is able to carry out a health check of your Company's articles and advise you of any changes that may be appropriate. If you wish to discuss this further then please contact a member of the Commercial Department at Cullimore Dutton whose contact details are below.

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