



PRIVATE LIMITED COMPANIES CONSTITUTIONAL CHANGES

This bulletin highlights recent changes to the law governing the constitutions of private companies.

The final stage of implementation of the Companies Act 2006 took effect on 1 October 2009. One area in which the act makes extensive changes is to the structure of a company's constitution and, in the case of companies limited by shares, their share capital. These changes are relevant not only for new companies incorporated after 1 October, but also for all existing companies incorporated before that date. In addition, the 1 October saw the introduction of new 'Model' articles of association for companies which are likely to be widely adopted in whole or in part.

We are advising our corporate clients that now is a good time to consider updating their constitutional arrangements to ensure that they comply with the new Act and that they take advantage of the new (often simplified) procedures afforded by the change in legislation. There are also a number of areas in which the new legislation can create difficulties for the unwary.

Many of the 1 October changes considered here are equally relevant to public companies and there are other issues that public companies should consider which are outside the scope of this edition of Dealpoint. Public companies wishing to find out more should speak to their usual Martineau

contact or Richard Wrigley on 0978 763 1586.

Memoranda of Association

From 1 October a company's memorandum of association will cease to be of any real significance following its incorporation. Going forward, new companies will only have a very short-form memorandum setting out the name of the company and the subscribers. For existing companies, the provisions currently contained in their long-form memoranda will be deemed to be part of their articles and will be capable of being amended or deleted by special resolution.

The key consequences of this are:

- III Companies will no longer have any prescribed 'objects' unless these are specifically set out in their articles (or for existing companies, deemed to be part of their articles). The objects in existing clauses may act as a limitation on their activities and can be deleted, in which case the company will have unlimited objects. Companies which currently have specific limited objects (e.g. charitable companies) will need to ensure that these objects are properly documented and are not inadvertently deleted when future changes are made to their articles.

- III Shareholders' and members' liability will be limited in accordance with a provision contained in their company's articles. This presents the risk that a company might inadvertently delete or amend such an article and thereby potentially compromise its limited liability status. This was not previously possible where the statement of limited liability was contained in a company's memorandum. Whilst there are saving provisions in the legislation to minimise the risk of this happening, in the future all limited companies will need to take great care when amending their articles so as to avoid any assertion that the limited liability of their shareholders is negated.

- III When providing copies of their articles to their shareholders or to Companies House, existing companies will now need to either provide a set of articles which include the provisions deemed to be included from the memorandum, or append those provisions to their articles.

Companies can pass resolutions to ensure that these pitfalls are avoided and we recommend that all private companies consider passing such resolutions.



Articles of Association

To coincide with the final implementation of the act, a new set of pro-forma articles of association known as the 'Model Articles' have been introduced. The Model Articles replace the previously prescribed set of articles known as Table A.

Companies which presently use articles based on Table A are not affected by the Model Articles, unless they elect to adopt them.

The Model Articles are drafted in relatively clear language and are a product of the government's desire to simplify the administration of private companies. Although well drafted, as with Table A there are a number of changes to the Model Articles which we would recommend most companies consider making.

In any event, companies should consider making changes to their articles to ensure that, amongst other things:

- III They can take advantage of certain reduced notice periods, including those for general meetings at which a special resolution is proposed.
- III They are not obliged to have an annual general meeting if they do not wish to.
- III They can, if they wish, take advantage of other new procedures introduced by the 2006 Act such as the ability to simplify the way in which a company changes its name, or the ability for shareholders to nominate other people to exercise their rights.
- III Their directors are not adversely affected by the changes to the law on directors' conflicts of interest.
- III Their articles do not include outdated terms and procedures which are no longer included in the legislation.

- III That the changes to the way in which a company's share capital is treated (considered below) are properly catered for in the company's articles.

Share Capital

A number of changes have been introduced that relate to companies' share capital. Perhaps most significantly, the concept of authorised share capital will be scrapped and companies will simply have a certain amount of share capital, all of which will be issued.

One consequence of this is that companies will be required to file 'statements of capital' with Companies House whenever their share capital changes and on each annual return. These statements are quite lengthy and this is likely to result in an increased administrative burden on companies.

In order to preserve the status quo, for existing companies the un-issued portion of their authorised share capital will now be treated as a limit on the amount of shares that can be issued (in much the same way as it previously operated to do so). However, that limit may be amended or revoked by ordinary resolution and related changes may be required to existing articles of association.

Another change affecting private companies is that, provided they only have one class of share, their directors will now not need shareholder authority to allot further shares unless required by their articles of association. Again, this will not apply to companies incorporated prior to 1 October unless an appropriate ordinary resolution is passed. New companies will need to ensure that their articles specifically restrict this ability if they do not want to give their directors carte blanche to issue new shares. Statutory pre-emption rights will continue to apply unless disapplied by special resolution.

Although the transitional provisions to the legislation maintain the current share capital position for existing companies, such companies will be left in a very confusing position in which it will not always be clear what restrictions exist as to the issue of further shares and what powers their directors have. We therefore recommend that all existing companies consider:

- III Passing an appropriate resolution to 'negate' the effect of their historic authorised share capital.
- III Passing an appropriate resolution to give their directors the powers envisaged by the new legislation.



- III Simultaneously amending their articles to provide for appropriate restrictions on the allotment of shares that are tailored to their particular circumstances.

Conclusion

The principal aim of the Companies Act 2006 and the accompanying secondary legislation was to simplify the administration of smaller private companies. This intention has clearly found its way into much of the legislation. However, the transitional provisions for existing companies are complex and, combined with the new system of registering share capital, may actually have the effect of making matters more confusing to directors and shareholders of private companies.

We therefore recommend that all private companies:

- III Have their constitutions professionally reviewed to ensure compliance with the new legislation and that the new procedures are taken advantage of.

- III Do not adopt new articles of association without first having them professionally reviewed.
- III Implement new procedures for monitoring and documenting their share capital so as to reduce the administrative burden of the new legislation.
- III Consider passing resolutions now to simplify and rationalise control over their share capital.

This Bulletin is intended to be a general guide to the law. Should you require further information on this subject Martineau's Corporate Group would be happy to assist. Please contact either:

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