

## **Private company limited by shares**

### **Advantages of updating your company's constitution after 1 October 2009**

On 1 October this year the remaining provisions of the Companies Act 2006 will be brought into force. The changes include the introduction of a new model form of articles of association for private companies limited by shares (with different forms for public limited companies and companies limited by guarantee).

Of course, a company may continue to operate after 1 October under its existing constitution. Provisions in the memorandum of association will be treated as provisions contained in the articles after 1 October and the existing articles will remain in force to the extent that they are not overridden by any provision of the new Act.

But updating the constitution could bring material benefits to a company and is widely recommended by professional advisers.

The new model articles are written in modern, plain English (unlike the out-dated language of Table A which was sometimes difficult to apply to current business practices) and are drafted with the small, owner-managed business in mind, therefore being shorter and more accessible to the average director or shareholder. However, it is arguable that the model articles are too simple in some respects. For example:

- (a) They do not allow the company to issue nil or partly paid shares
- (b) They contain no provision to appoint alternate directors (which may be useful if a director has to be away from the business for any significant period of time)
- (c) They do not include provisions that are expressly covered by the Act such as rights of members and their proxies in relation to company meetings; this seems to assume a degree of knowledge of the new Act (which comprises 1300 sections) that might be considered unreasonable for directors and shareholders of a typical owner-managed business
- (d) They include no provision for the appointment of a company secretary, should the company wish to have one.

In addition, any articles of association based on Table A before 1 October 2007 will contain a number of provisions that have since been overridden by the new Act and may therefore mislead directors or members as to their present rights and obligations. In particular, provisions relating to members' rights to appoint proxies and situations where a director has a conflict of interest with the company are likely to be incorrect and in need of updating.

### **Oswalds' new articles of association**

Oswalds' new form of articles of association for a private company not only give the company all the advantages of the new model articles but also cover those areas where additional powers or clarification of rights and obligations is desirable to make the administration of the company easier to understand and manage. The following deserve special attention:

#### ***Objects***

The objects set out in the company's current memorandum of association will, after 1 October, be treated as provisions of the articles restricting the business activities of the company (sections 28(1) and 30(1) of the 2006 Act). Such restrictions can be removed by the adoption of new articles to replace the existing constitution.

**Share capital**

The authorised share capital of an existing company will be construed as a restriction in the articles capping the number of new shares that the company may issue. Such a restriction can be lifted by adopting new articles.

**Share allotments**

Like Table A, the new model articles contain no provisions concerning allotment of new shares by the company and accordingly the obligation to offer new shares to existing members will apply under section 561 of the 2006 Act. Oswalds' articles will set out the procedure to be followed on allotment of shares, saving the directors the time and trouble of referring to the Act.

**Share transfers**

The model articles allow directors to refuse to register any transfer of shares whether or not fully paid. Oswalds' articles will include a full range of alternative options for the company to select from, including (i) shareholders' rights to transfer shares to their spouses or civil partners, children and other relatives or (ii) a requirement to offer shares to the other shareholders pro rata to their existing holdings before transferring them to any person.

**Directors**

By adopting new articles a private company can:

- (a) Permit directors to authorise the conflicts of interest of other directors without the need to obtain shareholder approval
- (b) Remind directors of their new statutory obligations regarding declaration of personal interests in company contracts and transactions
- (c) Extend the scope of indemnities given to directors and other officers by the articles to include third party qualifying indemnities, power to fund directors' interim defence costs ...
- (d) Remove any unnecessary requirement for the directors to retire by rotation

**Meetings**

Oswalds' new articles will:

- (a) Allow greater use of the internet and other electronic means to send notices and documents to shareholders and others, saving time and resources
- (b) Give greater flexibility for directors and members who are unable to attend meetings in person to participate via electronic communication
- (c) Omit any requirement to hold annual general meetings and to designate other general meetings as "extraordinary general meetings";
- (d) Reduce the period of notice required for the holding of a general meeting to pass a special resolution from 21 to 14 days;
- (e) Reduce the majority necessary to consent to short notice of a general meeting of the company from 95% to 90% of the total number of issued shares conferring the right to attend and vote at the meeting;
- (f) Inform shareholders of their extended rights to appoint proxies under the new Act;
- (g) Remove out-dated restrictions on the rights of members or directors who are situated outside the UK to receive notices of meetings.

**Audit exemptions**

Oswalds' new articles will not require the company to appoint auditors and audit the company's annual accounts (provided the company meets the statutory audit exemption requirements for the financial year in question).

For details about Oswalds new Updating Articles services, please contact our Corporate Legal Services team on 0131 557 6966 or visit our website at [www.oswalds.co.uk](http://www.oswalds.co.uk).