



## Companies Act Update 2006

### Constitutional changes taken effect on 1 October 2009: impact on existing companies

As you will be aware from our previous bulletins on the Companies Act 2006, the remaining provisions of the Companies Act 2006 finally come into force on **1 October 2009**.

The key change taking effect on 1 October 2009 relates to a company's constitution.

### Background

Companies incorporated under the Companies Act 1985 ("the 1985 Act") are required to have a Memorandum of Association ("the Memorandum") and Articles of Association ("the Articles"). Together, these documents comprise the company's constitution.

The **Articles** are essentially the company's **internal rule book**. Generally, a company is free to adopt whatever rules it likes provided that those rules do not infringe any of the statutory provisions in the 1985 Act. Most companies generally adopt model articles prescribed under the 1985 Act (commonly referred to as "Table A") with or without modifications.

Directors can be sued personally (for example by shareholders or administrators or liquidators following an insolvency) if they don't follow this "rule book".

The Memorandum sets out certain prescribed information such as the company name, the situation of the company's registered office in Great Britain (for example, England & Wales), the objects of the company, the liability of its members and its authorised share capital. The objects define the company's powers and the company does not have the power to act outside its objects. The company's authorised share capital sets out the limit on the amount of shares that can be issued by the company and if the company wants to issue shares beyond this limit, it needs the authority of its shareholders to do so.

### The changes

Companies incorporated under the 2006 Act on or after 1 October 2009 will adopt a new-style Memorandum, which will simply contain the names the subscribers to the company. The Memorandum will no longer form part of the company's constitution and instead, all constitutional matters will be dealt with in the company's Articles. Further, there will be no need for the company's Articles to set out its objects or its authorised share capital. Unless a company's Articles provide otherwise, a company incorporated under the 2006 Act will have

unrestricted objects and *no limit on the amount of shares that can be issued by directors. This may be an issue moving forwards for owners or investors who are not also directors or who otherwise directly control the board (for example through a valid shareholder agreement, investor agreement or suitably modified Articles).*

The 2006 Act also now prescribes new model articles for private companies, that are intended to be more user friendly and geared towards the needs of smaller, owner-managed businesses that wish to operate in a more flexible way than that provided for under Table A.

## **Do existing companies need to review/update their constitutional documents?**

Existing companies (by which we mean those companies incorporated prior to 1 October 2009 under the 1985 Act) are not required to make any changes to their constitutional documents as a result of the above changes. As from 1 October 2009, those parts of an existing company's Memorandum that are additional to that of the new-style Memorandum will automatically become part of the company's Articles. These parts will include the company's objects, statement of authorised share capital and anything else that is not the name of the subscribers and their authentication of its formation.

Having said that, existing companies may wish to consider having their constitutional documents reviewed/updated for the following reasons:-

- If an existing company is required to file its Articles at Companies House or provide a copy of its Articles to anyone on or after 1 October 2009, it will need to ensure that it also files or provides alongside a copy of its Articles a copy of those provisions in its Memorandum that are deemed to be provisions of the Articles. To avoid inadvertently failing to comply with this requirement, existing companies may prefer to ensure that these provisions are formally incorporated into the Articles.
- There are certain provisions of the 2006 Act that override a company's Articles, which might mean that the Articles of an existing company are misleading. For example, new provisions are already in force giving extended rights to proxies to attend and vote at general meetings and requiring directors to provide reasons for refusing to register a transfer of shares. These new provisions override any contrary provision in a company's Articles.
- There are a number of new provisions coming into force on 1 October 2009 that are intended to benefit private companies, not least new provisions allowing a company to have unrestricted objects, removing the concept of authorised share capital (i.e. the imposition of any limit on the amount of shares that can be issued) and enabling a company to change its name by a procedure that is less onerous than the statutory procedure (for example, the Articles can provide for the company to be able to change its name on the resolution of the board rather than having to get the shareholders to pass a special resolution). In order to take advantage of these changes, existing companies will need to make appropriate changes to their Articles.
- There are a number of new provisions that are already in force that are intended to remove the administrative burden on private companies, in particular the removal of the requirement to have a company secretary and the removal of the requirement to hold AGMs. However, those private companies incorporated prior to 1 October 2007 can only take advantage of these changes if there is nothing in their Articles preventing them from doing so. Companies may therefore wish to have their Articles reviewed to ensure that they are able to take advantage of these changes.

- Finally, but most importantly, directors are now subject to much more stringent duties, in particular with regard to conflicts of interests. They are therefore at greater risk of liability but at the same time, a further change introduced by the 2006 Act means that it is now much more difficult for directors who are also shareholders of the company to ratify their own wrongdoing. On the positive side, however, a safe harbour provision in the 2006 Act provides that directors will not be in breach of duty in relation to conflicts of interests in so far as they comply with any provisions in their Articles dealing with conflicts of interests. It is therefore advisable for directors, particularly those who hold multiple directorships, to ensure that suitable provisions are included in their companies' Articles. Directors of existing companies should note that Table A does not contain any such provisions. It is also now possible for companies to give a much wider indemnify to their directors than is provided for in many versions of Table A.

## Contact us

If you have any queries or would like to discuss reviewing/updating your Articles in the light of the 2006 Act, please contact:

Duncan James

**DD** 0845 310 7252

**E** duncan.james@berryman.co.uk

Patrick Billyeald

**DD** 0845 310 7192

**E** patrick.billyeald@berryman.co.uk

Roger Harcourt

**DD** 0845 310 5529

**E** roger.harcourt@berryman.co.uk

Tom Gray

**DD** 0845 310 7284

**E** tom.gray@berryman.co.uk

**Berryman** Park House Friar Lane Nottingham NG1 6DN

**DX** 10004 Nottm 1 **T** 0115 945 3700 **F** 0115 948 0234

**W** [www.berryman.co.uk](http://www.berryman.co.uk)

### DISCLAIMER OF LIABILITY FOR CONTENT

The above article is intended to provide general information only and is not to be treated or relied upon as specific legal or commercial advice. Specific professional legal advice should be taken before any course of action is pursued in relation to the information contained in the article. We make no representations or warranties of any kind with respect to the accuracy, completeness, or suitability for any purpose of the article and the information contained in it. We expressly exclude all liability for any loss or damage howsoever arising from the information contained in this article to the fullest extent permitted by law. The copyright in the above article is owned by Berryman Shacklock LLP. Any copying or adaptation of the article without prior consent of the copyright owner is prohibited.