

The Importance of Effective and Up To Date Articles of Association

The Companies Act 2006 (CA2006) introduced one of the most fundamental changes in company law for many years by replacing the previous Memorandum & Articles of Association based on Table A Regulations with what is now simply the Articles of Association. Table A Regulations ceased to exist and are replaced by the Model Articles prescribed in the Act. The Memorandum now contains nothing more than a statement of intent to register a company and is a historic document of no further value following the incorporation of a company.

Companies registered under CA2006 have unrestricted objects so much of the content of the old Memorandum to define the company's purpose is no longer required except in the case of companies limited by guarantee where it may be preferred or necessary to include restricted objects. Some other cases may occur where restricted objects will be necessary, but this is not so in the vast majority of circumstances.

Whilst the Model Articles now prescribed in the Act can be adopted in full, CRO in common with many professional advisers believes this leaves much to be desired for the sake of the proper conduct and management of a company. Having taken leading Counsel's legal advice on this issue, and in consultation with other members of the company registration industry, CRO has prepared bespoke Articles of Association that expand on the model articles so as to ensure all companies we register are properly equipped to benefit from the new Act as far as is practicable. We use these Articles in place of the Model Articles for all our company registrations.

Our bespoke Articles are prepared by senior lawyers with over twenty years' experience as members of the Law Society Standing Committee on Company Law. They are approved and endorsed by The Association of Company Registration Agents Ltd (ACRA), who are the company registration industry's only formal recognised body who act regularly for the representation of the industry in conjunction with the Registrar of Companies, HMRC and HM Treasury.

We understand that some registration agents do not offer such alternatives and advise clients to register companies by adopting the Model Articles, thus saving cost and effort in producing bespoke articles. The same is true of Companies House who only use Model Articles for companies incorporated through the Government web service. However, we strongly believe that they are far too simplified for practical purposes and will possibly cause potential problems in the future operation of the company. The following highlights some of the key features:

- the Model Articles do not allow for the issue of nil or partly paid shares
- they make no proper provision for multiple classes of shares
- they do not contain provisions for alternate directors which could be useful for companies where directors are to be absent for extended periods
- they contain no provisions expressly covered by the Act such as members' rights, proxies, meetings regimes, share pre-emption or directors conflicts, assuming instead that all directors have sufficient knowledge of the Act in detail – clearly an unreasonable assumption in the majority of owner managed businesses
- they do not contain any provisions for a change of name to be effected by board resolution
- they only allow for a Director's written resolution to be passed by a unanimous decision
- they include no provision for the appointment of a company secretary if the company has one

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Benefits of updating older Articles to comply with the Companies Act 2006

There are many arguments in favour of existing companies adopting bespoke articles under CA2006 and we aim to deal with some of these below.

It must be emphasised that those companies who choose not to adopt new articles will have to continue to apply certain regulations under whichever Act those companies were incorporated. This can clearly cause much confusion knowing when to apply older regulations and where the new Act takes priority. Updating the constitution of an existing company to comply with the Companies Act 2006 is widely recommended by professional advisers and could provide material benefits

Adoption of new articles under the Companies Act 2006 will be highly beneficial for the vast majority of existing companies, and we have outlined below some specific reasons and benefits of updating older company Memorandum and Articles to our new bespoke version of the Articles under the Companies Act 2006:

OBJECTS

Under the Companies Act 2006, the contents of an existing company's memorandum of association will be treated as a restriction on the business activities of the company. The memorandum can be imported into its articles, but there is some confusion as to how this will look in practice and as a consequence, many companies will propose special resolutions to delete the entire contents of the memorandum and adopt new Articles under the Companies Act 2006.

SHARE CAPITAL

The authorised share capital of an existing company will in future act as a limit on the number of shares that the Directors can issue unless it is removed. This is in conflict with the intention behind the Companies Act 2006 that there should be no limit on the number of shares available unless one is imposed through the articles. This restriction can be lifted by adopting new articles.

If companies want to restrict the subdivision, consolidation, redemption or repurchase of shares, they will have to provide for this expressly in their articles. This is a reversal of the previous position under Companies Act 1985.

SHARE PRE-EMPTION RIGHTS

Many companies, possibly a majority of those registered under older Acts, have articles that contain no rights of pre-emption, either on allotment or transfer of shares. The new Act contains provisions of pre-emption that may be overridden by existing provisions within older articles. The adoption of new articles ensures this important factor is properly covered and detailed within the articles so that the new provisions are clearly understood by shareholders. Where companies have no such provisions already in place, this is a perfect opportunity to introduce this vital feature for the protection of shareholders.

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DIRECTORS

Adoption of new Articles will allow companies to:

- permit directors to sanction conflicts of interest of a director without the need of shareholder approval;
- specify statutory obligations of directors in respect of personal interests in contracts and transactions;
- specify and extend the scope of indemnities to company officers;
- remove references to the retirement of directors by rotation.

MEETINGS

Adoption of new Articles will allow companies to:

- take advantage of some or all of the modernising provisions of the new Act, such as the ability to send and receive notices and/or forms of proxy by email or other electronic means, to hold telephone board meetings, or even meetings by mobile phone text;
- take advantage of the shorter time frames (14 instead of 21 days) for calling meetings at which special resolutions are to be passed, and for lower thresholds for calling meetings at short notice (90% instead of 95%). If they retain Companies Act 1985 Table A type articles, companies are likely to find themselves restricted to longer time frames and higher thresholds;
- remove references to annual general meetings and extraordinary general meetings;
- ensure that any provisions relating to the passing of written resolutions mirror the provisions of Companies Act 2006;
- remove outdated restrictions on the rights of members based outside the UK to receive notices of meetings;
- inform shareholders of their extended rights to appoint proxies under the new Act.

In conclusion the Companies Act 2006 simplifies corporate life in many respects, but will be likely to cause further confusion should a company decide to retain its existing memorandum and articles. The full benefit of this simplification and clarity will only materialise when a company takes action in order to take full advantage of the new Companies Act.