







Constitution Vs Replaceable Rules

The implementation of the Corporate Law Review Act 1998 made some fundamental changes to Australian Corporations Law and, more particularly, to the basic features of companies, such as their constitutions.

From 1 July 1998, companies will no longer have memorandums of association and articles of association, but may have a single set of rules known as a "constitution".

Alternatively, a company may opt to have no constitution at all, but instead may rely on basic rules of internal management that are set out in the law and known as "replaceable rules". As their name suggests, these rules are replaceable, and a company may adopt a constitution to replace part or all of them. One of the replaceable rules (Section 249X) is mandatory for public companies.

A number of the regulations of the previous Tables 'A' and 'B' have been used to create the replaceable rules, while other Table 'A' and 'B' provisions have been embodied in the text of the legislation. For the same reason that the provisions of these Tables were inadequate or undesirable in certain areas, we believe that it would be prudent for most proprietary companies to adopt a constitution. Primary areas of concern in this regard include: -

-  the definition of share class rights;
-  rights of pre-emption on transfer of shares;
-  avoiding 'hidden' powers, such as an unwanted casting vote for a chairman in the event of a voting deadlock at a company meeting;
-  the ability to appoint directors to make up a quorum;
-  the ability of the company to act as a sole-purpose superannuation fund trustee company and qualify for concessional rates on annual returns; and
-  expanded indemnity provisions.

Clearly, many "special purpose" companies will require a constitution eg. Those defined under the Law as "special purpose companies" and those companies used by such professionals as accountants, architects, engineers etc.

Existing companies having a memorandum and articles of association will be taken to have a constitution in the same form under the new Law. Many companies are choosing to adopt a new constitution that better reflects the changes brought about by the new Law. It would, however, be prudent to seek professional advice before implementing such a change.

Replaceable rules are not necessary, and do not apply, for companies that have the same person as the only director and member. The mechanisms for operation of a company of this type are defined by its constitution, the adoption of which we would recommend, or, in the absence of a constitution, by Section 224B of the Law.

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