PRE 1995 COMPANY CONSTITUTIONS – THE RISKS

Amendments to corporations legislation over the past 15 years have made older company documents (formerly known as "Articles of Association") outdated and potentially risky to continue with.

Where companies were registered before 9 December 1995, we would suggest that a change of company constitution should be seriously considered. Updating the constitution would provide the directors with up-to-date protection against the risk that they might inadvertently breach their obligations when acting in reliance on an outdated company document.

The company constitution directs what the company can and cannot do. Therefore, the law always refers to the company's constitution as the first step and applies the most restrictive interpretation to the conduct of directors and to the running of the company in light of the constitution.

Therefore, if an old company document is still being used, then the constitution will be used as the reference point for determining whether there have been any breaches committed by the company and its directors.

For example, many old company documents:

- Limit the company to "Authorised Capital"
- Still retain the concept of "Par Value" for shares (which has now been abolished)
- Require Private and Proprietary companies to have a registered office open to the public (this is no longer required)
- Require Capital Reductions to be approved by the Court (this is no longer required)
- Require the use of a company seal (this is no longer required)
- Do not refer to changes in electronic communication, such as electronic lodgment of documents (including annual returns), or company meetings by telephone or video
- Require directors to recommend a dividend, which is then approved by shareholders in general meeting (whereas directors are permitted to declare and pay dividends without referring the matter to shareholders)
- Require a minimum of two directors and two shareholders to run the company (whereas only one director and one shareholder is now required)
- Do not refer to the s187 *Corporations Act* provision that allows directors of wholly owned subsidiaries to act in good faith in the best interests of the holding company (even where the decision of the directors may not be in the best interests of the subsidiary). Such protection only applies where the company constitution specifically refers to s187 (and where the subsidiary is solvent and does not become insolvent because of an act of the directors)
- May extend indemnity provisions to the company's auditors, but not to officers of subsidiary companies (whereas this may not be appropriate today).

More information

Should you have any queries or require more information, please contact the team at Topdocs on 1300 659 242.

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