



MEMO

To: Board of Directors
From: Company Secretary
Subject: **CONSTITUTION**

The operation of most companies is generally governed by a Constitution (prior to 1998 known as Memorandum & Articles of Association) in which are set down rules to guide directors and officers in the internal management of the company.

In lieu of a Constitution a company may simply adopt the “Replaceable Rules” in the Corporations Act (section 135) or use a combination of both (section 134).

Note: there are additional sections of the Act which cover the management of companies and must also be complied with; as well as any applicable ‘common law’ provisions.

A table of Replaceable Rules is found in section 141. Note, a specific provision in a Constitution can override the Replaceable Rules.

These provisions apply to virtually all companies, public and proprietary, other than the following company types where a Constitution is mandatory:

- public companies 'Limited by Guarantee' that are applying to omit the word Limited from their name under section 150;
- 'No Liability' public companies under section 112;
- certain 'special purpose' companies.

Also, under section 135(1) the Replaceable Rules do not apply to proprietary companies where the one person is the sole director and sole shareholder, although a Constitution may be adopted – but see sections 198E, 201F & 202C.

The Constitution / Replaceable Rules has the effect of a contract (section 140) between:

- the company and each member/shareholder;
- the company and each Director;
- the company and the Company Secretary;
- a member and each other member.



When application is made to form a new public company, any Constitution must be lodged with ASIC. This original Constitution must be signed by all the original members of the company. Also, any subsequent (member approved) modification to, or [repealing and] replacement of, the Constitution must be lodged too.

A proprietary company can no longer lodge its Constitution with ASIC, but any original (and any changes) must be retained at the company's office – as it must also be for a public company – and a copy must be provided to any member requesting it (section 139). But note, a proprietary company seeking to change to a public company type must at the time of making application also lodge its intended Constitution with ASIC.

For a proprietary company too, any original or later/amended/modified/replaced Constitution must be approved by its shareholders.

Changes to a Constitution require a special resolution (at least 75% of members approving).

DISCLAIMER

The comments in this memo reflect some commercial aspects and observations on the matter experienced or observed by the writer in practice as he understands them. The information is given as a guide only and does not represent a definitive or legal view of any of the issues raised, covered or referred to and the reader is urged to seek his own professional advice on all aspects of, or pertaining to, this and any related matter.