

**Inside this issue:**

NEW UP-TO-DATE CONSTITUTIONS FOR NEW COMPANY SET-UPS	1
NCS CHANGE IN PROCESS FOR NEW COMPANY SET-UPS	2
DIVISION 7A LOAN AGREEMENTS	2
PREVENTING PROBLEMS AND PROTECTING SHAREHOLDERS IN PRIVATE COMPANIES	3
TRAINING COURSES FOR 2009	4
NCS SERVICES	4

**Deadlines for
Orders Before
Christmas**

**ALL COMPANY
ORDERS MUST BE
SUBMITTED TO US
NO LATER THAN
4 pm Monday
22nd December.**

**ALL TRUST ORDERS
MUST BE
SUBMITTED TO US
NO LATER THAN
4 pm Monday
22nd December**

**NEW ORDERS WILL
BE PROCESSED
FROM 7th JANUARY**

NCS Newsletter

Well, it's the last newsletter for 2008 – where has the year gone? It hardly seems possible that we have been in Bundoora for nearly twelve months, though we settled in very quickly.

We have implemented many changes during the year—from our new storage options for new company set-ups to revised methods of completing shareholder details on registration forms. Our website has also been updated, as have our order forms – now in a more “user friendly” editable PDF format. Our new revised, up-to-date, easy to understand constitutions are finally completed—see further details below.

We also include two feature articles: the first by George Kolliou relates to the importance of having all the appropriate “Loan Agreements” in place to meet the ATO requirements in line with Division 7A Regulations. The second article by Russell Wheeler is on the importance of “Stakeholder Agreements” for new business structures involving “Partnership Agreements”.

We thank you for your support during 2008 and look forward to a challenging 2009 for all of us!

Details of our office Christmas closure are detailed on page 4. Please note we close at 5 pm on Tuesday 23 December and re-open with “skeleton” staff on Wednesday 7 January 2009. Our full complement of staff return on Monday 12 January 2009

New Up-to-Date Constitutions for New Company Set-ups

As previously advised, over the past six months, we have been working on having our standard constitutions for new companies reviewed and updated.

Many governance problems derive from flawed constitutions. Company constitutions underpin the legal framework of business but often receive little attention in the drafting.

Standard constitutions should be reviewed on a regular basis to make sure they are still up-to-date.

“It is usually a governance or financial crisis which prompts a review of the Constitution.” (Stephen Brown, Etienne Lawyers)

The constitution is the governing body or rule book of the company as defined by the initial shareholders/members (subject to the Corporations Act 2001).

We have spent some time researching appropriate legal firms and practitioners and talking to our accounting firm clients to eventually achieve a great result.

Peter Moon, a partner in Melbourne law firm Logie-Smith Lanyon, has prepared the following:

- Standard Pty Ltd Company constitution;
- Public Unlisted Company constitution;
- Sole purpose Superannuation Trustee Only constitution.

Please note clauses related to “Loans to Borrowing Members” and a sample “Loan Agreement” have been included in the standard Pty Ltd and Public Company constitution as requested.

However, please refer to George Kolliou’s article on page 2 on the importance of having a separate signed loan agreement.

Damien Smith, the Managing Partner of Melbourne law firm Enterprise Care Not for Profit Services Pty Ltd, has prepared the standard constitution for a Company Limited by Guarantee.



*Wishing all our
clients, customers
and suppliers
a safe and happy
Christmas and
New Year.*

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NCS Change in Process for New Company Set-Ups

In the past, Sue Norfolk has been the initial shareholder on most new company set-ups to facilitate the registration of the company. Hence, Sue had to sign all the constitutions as the initial shareholder for new companies.

With the implementation of our new constitutions—which do not have to be signed by the initial shareholders—Sue will no longer have to sign the constitutions.

The constitution will simply include the names and addresses of the initial shareholders. This will mean that ASIC are notified of the initial shareholders on the Form 201 (registration form) which NCS electronically lodges with ASIC.

Hence, no Form 484 to notify the redemption of Sue's shares and allotment of the members of the company's shares needs to be prepared or lodged.

This new process will save us all a lot of time and stress chasing the return of the signed Form 484 for lodging with ASIC in the required time.

It will also avoid our accounting clients having to advise clients why Sue is the initial shareholder in their company!

If you have any queries about this change, please contact one of our friendly staff on (03) 9466 9990 or enquiries@ncs-services.com.au

Division 7A Loan Agreements

It is not uncommon for company constitutions to incorporate a Division 7A loan agreement. Typically, a constitution will provide that the company may make loans to members of the company and the terms of the loan must comply with the Division 7A requirements. The constitution may also provide the terms of the loan agreement in the appendix to the constitution or within the body of the constitution itself.

Just because a company constitution provides for a Division 7A loan agreement does not mean that the requirement that the loan agreement be in writing is satisfied. Advisors should be aware of this and not rely on the constitution to satisfy the Division 7A loan writing requirements.

The Australian Tax Office (ATO) has issued Taxation Determination TD 2008/8 which deals with the elements of a loan agreement that must be in writing for the purposes of paragraph 109N (1)(a) of Division 7A of the Income Tax Assessment Act 1936. The ruling states that just because the terms of the loan agreement are contained within the constitution does not mean that the requirements of Division 7A will be met. In particular, Example 4 of the ruling and paragraph 29 of the explanations to the ruling are relevant.

In most cases, where a Division 7A loan agreement is contained within the constitution and there is a written agreement between the company and the borrowing member of the company that loans made by the company are on the terms set out in the company's constitution, this agreement along with the terms set out in the constitution should be sufficient to satisfy the requirements of Division 7A. This agreement could be in the form of a resolution passed by the company stating that loans are to be made on the terms set out in the constitution and the member acknowledging acceptance in writing and signing a copy of the resolution.

For any queries in relation to these issues, please contact George Kolliou, Senior Tax Counsel, Logie-Smith Lanyon Lawyers on (03) 9628 4168 or gkolliou@logielaw.com.

Note: *George Kolliou is the Senior Tax Counsel at Logie-Smith Lanyon Lawyers. He holds degrees in both Law and Accountancy and has practised in the taxation area for 24 years. His main areas of practice are Income Tax, Capital Gains Tax and GST with an emphasis on issues facing SME clients and their advisors. George regularly presents seminars and writes papers for publication on tax related issues.*



Preventing Problems and Protecting Shareholders in Private Companies

Few people are aware of how many jointly owned businesses fail, or fail to achieve their potential, because of problems between the shareholders – disagreements, misunderstandings or just different expectations. The risk increases in more difficult financial times, such as we are starting to experience.

"A gram of prevention is worth a kilo of cure"

When people go into business together, they rarely spend enough time thinking about what might go wrong and how to prevent it and they are confident that they will be able to sort out any internal problems by agreement. But things change, particularly if the business is not as successful as they expected, which often means people are not as easy going, disagreements occur and mutually advantageous solutions cannot be reached.

This can be avoided by discussing the many 'what ifs' [e.g. *What if we need more capital? What if there is a breakdown in the relationship? What if someone needs to bail out?*] and agreeing in advance on a fall-back solution if the problem can't be resolved by agreement. Ideally, this should be done and recorded in a stakeholders' agreement before the business starts. But if it wasn't, the time to do it is now before things get worse. By the way, it is referred to as a "stakeholders' agreement" because it is important for unit holders in a trust, joint venturers and traditional partners to have this sort of agreement, not just shareholders in a company.

Causes of problems

Apart from misunderstandings and unrealised expectations, there are many reasons that problems arise between the stakeholders in a business, such as:

- The minority shareholders end up with their shareholding being diluted.
- The majority are prevented from selling the business by the minority.
- Some of the shareholders get involved in a competing business.
- Deadlocks occur without any agreed deadlock breaking mechanism.

Another problem which is quite common – minority shareholders being locked in with no-one prepared to buy their shares at a reasonable price – often has disastrous consequences because, if a solution is not found, a court will normally order the company to be wound up, particularly in a 'quasi-partnership' company. People think common sense will prevail but it is amazing how often a solution cannot be reached and the lawyers get involved. This is invariably a very expensive outcome for everyone.

Fall-back solution

This type of problem can be prevented by agreeing on 'exit' rights. For example, the shareholders might agree that they will remain committed for a fixed time (e.g. 6 years) after which any shareholder can sell and get a fair price.

Information about how this can be achieved, and all those issues that need to be discussed and agreed on by the joint owners of a business, will be sent to you if you complete a short form on the "Contact Lexxon" page at www.lexxon.com.au, mention "Norfolk" and ask for our stakeholders' paper. This will help you advise your clients about the potential problems and how to prevent them.

Russell Wheeler
Lexxon Lawyers Online

Note: *Russell Wheeler has been a solicitor for over 30 years. He specialises in business law, particularly negotiating and drafting stakeholder or shareholder agreements. He has handled litigation when shareholders did not make the effort to protect themselves with a written agreement and has been involved in business ventures where stakeholder agreements have played a critically important role. He has now streamlined the whole process to the extent that it can all be done online and the cost is half what it used to be.*

CORRECTION:

Please note: In our September newsletter, the cost of the "No binder option" was round the wrong way.

Costs are:

**No company seal—
\$655**

**With company seal—
\$675**

If you would like to register your interest in either of the courses offered by NCS, please call our office on (03) 9466 9990



Opening Hours over the Christmas Period

NCS will close at 5pm on Tuesday, 23 December 2008 and reopen on at 9am on Wednesday, 7 January 2009

Wishing you all a safe and happy Christmas and New Year.

Schedule of Training Courses for 2009

We are presently finalising details of our training courses for next year and will have all the details available on our website at www.ncs-services.com.au by mid to late December 2008.

We have found the "Introduction to Corporate Secretarial Practice and ASIC Compliance" course is very popular because it is difficult to keep up with all the changes in this area.

It is also difficult for small accounting firms to have the time and expertise to offer appropriate training to their new, inexperienced staff.

Our courses are unique in the market place and are presented by Sue Norfolk who has 20 years of "hands on" experience in Corporate Secretarial Practice.

Details of courses available:

An Introduction to Corporate Secretarial Practice and ASIC Compliance

This training program will give participants an overview of the role of the Australian Securities & Investments Commission (ASIC) and the importance of corporate secretarial compliance. This course is suitable for accounting or administrative staff who will be responsible for corporate secretarial compliance. The practical, hands-on nature will suit those staff who actually prepare and lodge ASIC Forms.

Advanced Corporate Secretarial Practice and ASIC Compliance

Ensuring compliance with all the regulations and the *Corporations Act 2001* is of vital importance. Failure to comply can have severe implications for company officers and the professionals who advise them. Keeping up-to-date is a prime concern. This course is aimed at accounting staff and managers who look after Public Unlisted, Public Listed and companies Limited by Guarantee. We cover foreign companies registered in Australia, Australian companies wholly owned by foreign companies etc.

For a course outline, please contact our office by phone or email enquiries@ncs-services.com.au

NCS Services

Onsite Corporate Secretarial Assistance at your Firm's office:

Just a reminder as it seems some of our clients are apparently not aware that we provide this service. We can provide experienced staff to maintain your company's ASIC compliance and systems on a temporary or part-time basis while your staff are away sick, on annual leave or maternity or long service leave. We also provide a consulting service to help you implement systems and train staff at your office in all areas of company secretarial practice. All our staff are experienced users of BGL Corporate Solutions "CAS" software.

Corporate Secretarial Assistance by Remote Access:

We can also maintain your firm's ASIC Compliance by remotely accessing your BGL "CAS" System. We currently maintain a number of Accounting Firm's and large Public company's "CAS" databases from our office. If you are interested in more information, please call Sue.

Assistance for Small Accounting Firms with 75 or less companies:

We can maintain your companies on our BGL CAS System and, if required, maintain the Company Registers at our NCS Office. For more details, please call Sue.

Maintenance of Share Registers for Unlisted Public Companies:

We can maintain the Register of Members for Unlisted Public Companies with large share registers, including producing relevant share certificates and statement of holdings.

For further details please don't hesitate to call our office on 9466 9990.