CHECKLIST for Preparing Shareholders' Agreements

This checklist sets out some of the main information required to prepare a shareholders' agreement as well as some key issues to be considered. It is not intended to be a comprehensive checklist but merely to serve as an initial guide.

1. Background

What are the company's details (company name, ACN/ABN, registered address, place of incorporation)

Names and addresses of all of the shareholders. It is important for each shareholder to be a party to the agreement, regardless of the number of shares which he/she/it may own

Shares already allocated to each shareholder and additional shares to be allocated plus details of the capital contributions to be made by each shareholders and any timing for these (e.g. all paid upfront or part upfront with commitment to inject more capital later)

Nature of the company's business

2. Some Common Topics to Consider

Rules about of future share issues

Election of directors and the rights of shareholders to be directors

Limitations on powers to protect minorities – e.g. some require special or unanimous resolutions (see examples below)

Employment – will any directors be employees? If so, will the agreement guarantee them the right to keep their position (subject to typical breach of contract exceptions)

Buy-sell arrangements to deal with death/retirement/forced sale

Drag-along tag-along rights – if a majority want to sell the company

Is the intention that the agreement continue to operate indefinitely or do the parties plan to sell or float the company within a fixed period? If so, what level of agreement will be required to decide on a sale or float (special resolution/unanimous etc)?

3. Directors and Officers

Among the issues to be considered are the following:

- Number of directors
- Persons to be elected as directors and officer
- Functions of directors
- Resolution of disputes among directors
- Directors' and shareholders' meetings

How will the shareholders select accountants and auditors for the corporation? What financial reports should be prepared for the shareholders?

4. Key Decisions

What matters should require the consent of a special majority or all the shareholders?

Consider:

- Issue of additional shares
- Mergers and acquisitions
- Sale or change in the business
- Sale or purchase of significant assets
- External funding/finance
- Large value contracts/purchases
- Execution of contracts which impose material financial obligations from the corporation
- Significant increases in salaries

Should the agreement provide for the corporation to indemnify directors and officers for their actions on behalf of the corporation?

Should the agreement include provisions regarding the payment of dividends? Consider either allowing the directors to determine the timing of dividends or setting a minimum dividend percentage.

Will shareholders have access to all books and records (more than shareholders would normally see)?

5. Share Sales/Purchases

The agreement normally provides pre-emptive rights for shareholders, so that any shareholder wishing to sell their shares must first offer their shares to the other shareholders. However, there are some issues which need to considered:

Does the selling shareholder have to offer all their shares for sale or can they just offer some of them?

What if no-one wants to buy their shares – can they then sell to an outsider or are they simply unable to sell them?

Should the agreement provide for optional/mandatory purchase of shares upon the termination of employment of a shareholder?

Should the agreement provide for mandatory purchase of shares of a deceased/disabled shareholder? If so, is there a need to maintain key-man insurance or life insurance to cover them in order to fund the buyout of their shares using insurance proceeds?

How is the purchase price for shares subject to buy-sell provisions to be determined? By the company's accountant or an external valuer. Will it be based on 'fair market value' or on book value plus a goodwill component (e.g. calculated on a multiple of earnings)?

The price may also vary depending on the event that triggers the buy-sell provision. For example, a discounted price might apply to an exiting shareholder whose shares are bought as a result of breach or involuntary exit.

What provisions should be included for payment of the purchase price for shares? For example, a portion of the price may be paid immediately in cash and the balance may be paid out in instalments.

6. Employment Matters

Should the agreement include provisions relating to employment of the shareholders by the corporation? If so, consider the following issues:

- Duties of each shareholder in his or her capacity as an employee and the amount of time that each shareholder will spend on the activities of the corporate business
- The amount of compensation to be paid to each employee/shareholder (including benefits)
- The circumstances in which employment may be terminated

Should the agreement include non-compete restrictions on the ability of shareholders and directors to engage in competitive activities?

This is not a comprehensive list and there will be different or additional issues which need to be considered depending on the particular facts and circumstances. For further information, contact Shah Rusiti, partner.