



Talking Law

Episode 118 – Tips and Tricks with Shareholders Agreements

Note: *This has been automatically transcribed so will be full of errors! We are not providing it to you as a word-perfect version of the podcast but just as an easy way to provide you with a different way to be able to scan for information that might be relevant to you.*

Transcript

Joanna: Hi, it's Joanna Oakey here and welcomes back to Talking Law, a podcast proudly brought to you by our commercial legal practice, Aspect Legal. Now today we have on the show the amazing and fabulous Claire Bibby, from our very own Aspect Legal to talk today all about shareholders agreements. What to do and what not to do.

Claire: Let's go for it.

Joanna: I'm sure people buy now and not wanting out of this podcast, a boring, old lecture on legal stuff. Well, I guess what we're doing today is we're talking about shareholders agreements. And maybe what we might do is we might talk just a little bit about the reasons for them. And then let's talk about some of the issues that we've seen what not to do, and maybe we could even throw in a what to do, perhaps we can take out a bit of a positive to the end. Let's start with why have a shareholders agreement in the first place? What are the issues that we're trying to avoid? What can

happen if we don't have one in place?

Claire: Shareholders agreements are like the Bible of buying into an unlisted company. So buying into a listed company, you don't have a shareholders agreement buying into an unlisted company, you do have a shareholders agreement because it regulates the relationship. Think of it like a prenuptial, which most people don't have unless they're extremely rich. But a shareholders agreement is like a prenup, you know, you're going into the relationship with your eyes wide open. So the things go pear-shaped in the future, you've got some rules and some structures as to how everything is going to be resolved. But it's not just about when the relationship breaks up. It's also about how the relationship survives, and how the legal wheels of justice turn, so to speak, it's a way to protect yourself and ensure the smooth functioning of the business. Because at the end of the day, when you invest in a private company when you invest in anything, you know, you want to know that at some stage, you're either going to make a shitload of money, but you're gonna get your money back. And there's got to be some rules around that. because not many people are just going to give over you know, 50 grand or 100, grand or more, you know, can go into the millions of bucks, and then just cross your fingers and hope for the best. If you did go into business like that, then there would be no legal profession, and we wouldn't be here today. So, you know, conflict is common. Yeah. And conflict is business. Yeah, that's what you need a shareholders agreement for how to deal with conflict.

Joanna: I find it fascinating, constantly fascinating. The number of businesses that we deal with, that don't have shareholders. And quite often, that becomes apparent because they, you know, come to us as new clients and say, you know, there's an issue, or they want to exit or one of the other parties want to exit. And of course, the first thing we say is, can we have a look at the shareholder agreement? And there's just no one there?

Claire: Yeah, I was talking to a new client the other day and was saying, you know, have you got this? Did we get that? No, no, yes. And then he just kept changing his mind. And I thought, Oh, you poor fella. He just didn't know what he had. Yeah, because he had set the business up himself. And that's so common, because when people are setting up businesses, as opposed to a company that's already well established, and setting up a new business, you know, when you're a newbie, so to speak, you pick the pennies aside, so important. I mean, they're important all the time. But especially so when it's a new business, and you want to do things yourself, and no criticism levied at my brothers and sisters in the accounting profession. But pretty often, when they're setting up a business for a client, they might buy them a shelf company, and then that's it, or the client themselves, they might buy a shelf company, or they might even take the plunge and go onto the asset website and poke around there and fill in the forms and spend 1000 bucks and think they've got themselves a company when all they've got pretty much is maybe some rules and not a lot more than that. If you're going to go into business, I'd suggest that think about getting some advice, think about speaking to a lawyer thinking think about speaking to an accountant who knows what they're doing. And don't just buy stuff off the shelf and this is when I can use my shit in and shit out the analogy. You know, if you don't put a lot of effort in at the beginning, you might find yourself in a bit of a pickle. Later on and a shareholders agreement Jo, you and I, we live and breathe these things. So we know it, but they're a crucial part of setting up a business. And your lawyers know about that. And your lawyers are really the experts who should be setting out your shareholders agreements for you.

Joanna: The other thing that I noticed is quite often, businesses may have started down the process of creating a shareholders agreement, but they're not got to the end of it, because it's another regular occurrence for when we asked this question, you know, for the answer to be no, we don't have one or for the answer to be. Ah, we spoke about that many years ago when he's something that we had drafted up for us to think about, but we just never finished it. That's another common thing right?

Claire: Yeah. And there's a whole body of law on verbal agreements. But you don't want to go down that path. No, you don't want to spend a thousand bucks with a law firm trying to work out if you've got a verbal or an oral agreement in place, you want to have an agreement in place and your money on the real issue, which is addressing whatever it is that needs to be addressed.

Joanna: Yeah. And once again, I think that this is something that maybe is seen as quite difficult because it is almost like a checklist. It's a checklist of going through asking a number of questions in relation to making sure everyone's on the same page in relation to how a number of things are dealt with, which we'll speak about in a moment, like decision making, or dealing with exit or all of those sorts of things. But I guess the issue is that people just feel like it's too difficult to have to answer these questions. But I tell you if it's difficult to answer the questions when you're all getting on. Can you imagine how much more difficult it is when you're not getting on?

Claire: Yeah, I mean, visiting a lawyer is like visiting a dentist, most people don't want to do it.

Joanna: Not our clients.

Claire: Yeah, not our clients. But you know, it's important to get a lawyer who not only knows what they're doing but also builds a relationship with you and has rapport and trust and can explain to you why you need this 50-page segment.

Joanna: Exactly. And can help you make decisions because there are decisions along the way. But you know, the reality is it can get gotten so don't feel to it. See. So let's go back and just quickly touch on some of the things that we touch on in shareholders agreements, then. And one of the first, I guess a quite obviously, is about decision making, how decisions are going to be made?

Claire: Yeah, well, one of the important things when you're buying what I mean, is loads of important things when you're buying shares. But when you're buying shares, are you buying voting shares? Or are you buying non-voting shares? Because that's going to have a really important impact, obviously, on whether you have a say, Are you going to be a director? Or you're not going to be a director? That's really important? Are you going to be entitled to receive documentation? Or do you have no rights to documentation? Like this sort of stuff is really important, because you're handing over usually a pretty substantial sum of money. And whether you're going into business with venture capitalists, or whether you're going into business with friends and family, you want to know what the ground rules about these basic issues. And I say basic, in a sense, not that they're simple or low level. They're basic issues to us as lawyers, because hey, if you've worked this out, you want to have those basic,

Joanna: Fundamental.

Claire: Yeah, fundamental. That's the word fundamental issues, sort of the beginning because you don't want to find you've gone and given John next door, 50 grand go and buy John's mowing business and you own 50% of it. But then your next-door neighbour goes off with your money and you have no right to make any decisions, no right to receive any information. And you really just got a hope that one day John might come back and give you not only your original investment back but some profit, which would be pretty awesome as well. So don't leave it to chance set out the ground rules. And lawyers are the people that read the inside of the monopoly box. That's what we are. We are the people that read the inside of the monopoly box. And we are the people that are going to know the rules and help you set them out because trust me, you do not want to read the inside of the monopoly box.

Joanna: That's a quote. I tell you what I have never heard that before. Yeah, you're right. I do. Anyway leaving that on aside.

Claire: No one wants to play Monopoly.

Joanna: Just one comment that I have on the directorship side. So this, this question about, you know, do you want to be a director, it's also about whether or not you have the right to the appointment of a director as well, which is, you know, sometimes a completely overlooked consideration. And one, you know, I've had clients in the past who, who really don't want to hold directorships, for very good reasons. But having the right to the appointment of a directorship is just something that's super important, I guess, to think about whether you want to be built into that right for yourself.

Claire: Absolutely. And some people, as you say, they may not, for whatever reason want to be appointed a director, but having the right to appoint somebody as a director. I mean, you may know somebody who's really experienced and who you trust, who can go on this board for you and can independently see what's going on and help you make the decisions on what's happening with your money, what's happening with the business, what's going on. You don't want to just give your money away friends, and then hope that something's going to come back one day, you want to have some rules in place.

Joanna: Yeah, brilliant. Okay. All right. So we've talked about many things. So where are we up to next? What else should we be considering the inclusion of a shareholders agreement?

Claire: Well, I like and investing into a company like getting married, you know, it's a long term relationship. So you've got your pre-nup. And one of the things you've got to work out is what happens if I've had enough of this relationship? I want to get divorced, I want to sell my shares. How hard is it going to be for me to sell my shares? Leaving aside the fact of unlisted companies out of their very nature illiquid? How hard is it going to be for me to sell the shares? What happens if my next-door neighbour decides they want to buy me out? Can I just sell to them? What happens if one of the other shareholders though maybe somebody wants to buy their shares? And I want to tag along on that deal? Yeah. Or I want to be dragged along on somebody else's deal. You know exactly where I'm going here. Because I'm using the buzzwords, stuff like pre-emptive rights, how hard is it going to be for me to sell my shares, because if you think about it if you're in business with, say, three of your best mates, and you're the fourth,

and you want to sell out, they may not want a complete stranger coming into their company, and they may want to have the first right to buy your shares themselves? That is extremely common. And there are lots of different ways that you can document those sorts of deals and work out well, how much they have to offer you for those shares, do you have to go off and hire an accountant? Does it have to be based on the last three years EBITDA something like that, like there are loads of different ways you can cut and slice and dice this sort of stuff? So knowing what the rules are, when you want to leave and sell your shares, that I would say is one of those top headline fundamental issues that your lawyer wants to cover for you in your shareholder's agreement.

Joanna: I completely agree. Of course, I completely agree on Claire, but I do agree. I just find that this is the key issue, when we have clients coming to us who will look to an exit their shareholding in an entity when the when there might be other shareholders continuing. or indeed if the shoe is on the other foot, you know, the other shareholders or one other shareholder is looking to leave. This issue of exit and how that can work is one of those things that I that comes up again, and again and again, where organizations don't have a shareholders agreement in place. And it's really hard to navigate, it can be really hard to navigate, particularly if the relationship is strange at that point, which you know, it often is when one, not the others are looking to exit

Claire: Totally and think about it as well, from the perspective of what stage of your life are you in? If you are close to retirement, and you don't want to have a hands-on role, or you really going to need some cash quickly, in the next few years because you want to invest it, then you want to make sure that you can actually get out of the company and get out at a reasonable amount. You know you don't want to have invested 100,000 in fines. You can only get 20 bucks back I mean that that's a very unrealistic example. But it emphasizes.

Joanna: Yeah but it certainly happens.

Claire: What two things that we can always be sure of in life are death and taxes. There's They say, and what happens if you are to pass away and your spouse is left with these shares, and they need to sell them, you know, they're going to have to know what's in these documents, or at least find out what's in these documents. And you don't want them to be screwed over by people because shit to use the term again, can happen. And you want to make sure that your lawyer has protected you and protected the broader interests that you have. Because an investment in a company is a long term investment, and it may actually survive you. So as long as your lawyers, we will think about that sort of stuff, you won't think about it, probably, but we will think about that sort of stuff and try and protect you and your broader interests.

Joanna: And going to the direction in relation to what's usual in terms of dealing with these issues?

Claire: Yep. absolutely.

Joanna: That can be another thing, you know, I see a lot of confusion often in terms of, you know, thinking through the risks, but then not being sure about how to deal with the don'ts let yourself get confused. You know, because there are some simple ways to deal with all of these.

Claire: Absolutely and you know, one thing I say to lots of people, and I also say this to young lawyers as well, we are not brain surgeons, we're just people who are really awesome with words and structuring deals if you do the sort of law that you and I do, Joe, and so don't try and navigate yourself, because you wouldn't operate on yourself. If you had to have an operation. You know you might go and do Dr Google. But you know, if you're doing something that involves a lot of money or a lot of risks, or is really important to you don't cut corners if you don't have to get yourself a lawyer who knows that stuff.

Joanna: Yeah. And actually, it's a really interesting point, because, you know, a lot of what we're talking about here, perhaps might be perceived to be directed towards people who have not had a lot of experience with these types of agreements before. But do you know, it's exactly the same with really experienced investors? And the importance of still getting that constant cross-check on agreements because I've seen a lot of very experienced and sophisticated investors who've done this many, many times before, sometimes miss some of these detail, because they've seen it so often before. So it's your the comment that you make? I think he's a comment across the board. Yeah. And, you know, irrespective of the sophistication of, you know, the number of these types of deals that have been done.

Claire: Yeah, absolutely. And, you know, imagine it from another context as well is, say you invested in a company because of the entrepreneur who's in the CEO ship. What if they pass away? What if they sell their shares? What if somebody else moves into that seat? You're not thinking about this sort of stuff, but might you want to possibly get out if it's not still the person who you invested your money in? because quite often, you are investing in the personality? If they're not there anymore, you know, you may want to get out. And you want to know, at that point in time that you've got a really clear exit mechanism. That is not only clear, but it's fair. And that's what we do. We create those clear mechanisms for you.

Joanna: Brilliant. Okay, wonderful. So do you think we've missed anything out? Well, we've missed a hell of a lot out. I mean shareholder agreements are one of those things that are of such critical importance, that not being funny, we could actually talk probably for hours about it. But I'm sure you the listener, don't want to sit there listening to us for hours. And if you do enjoy this episode, let us know. And we'll do another few podcasts in the area. But just before we leave, are there any other sort of high level? Other areas that we haven't really touched on yet?

Claire: The other thing that I would say that we've talked about conflict is common. But what we haven't talked about is dispute resolution tools. And what I mean by that is, what happens if you do have a boundary with your other shareholders. And I've got that very example. Now with a client where he's one of three directors, he's asking for paperwork, and he's just getting blanked. And there's nothing he can do because the agreement doesn't say anything, and he doesn't have any rights under the Corporations Act that I can point him to. So you don't want to always be now you're going to find this a bit strange listeners, you don't always want to be running to a lawyer and going to court. You know, sometimes, you might want to use alternative dispute resolution mechanisms like mediation, or at least have a clause that says before you end up in court, you got to try mediation first, because mediation has a really great success rate, if you use the right type of mediator, and there are lots of professional organizations

out there. And when we recommend dispute resolution clauses to our clients, we know about all of this stuff. So we'll actually say to you in in the majority of cases, you don't want to run to court. First of all, you want to try and explore other ways to settle, not only from a cost perspective but also from a time perspective and a reputation perspective. Because at the end of the day, if you've got two lawyers facing each other at 30 paces, the chance of your relationship still being intact to the end, is pretty limited. And we don't want to do that to our clients, we want to try and keep things as amicable as possible for them. But you know, except that sometimes things aren't going to go really well. But at least let us give you those sorts of causes so that you've got a chance of still keeping this relationship together. If that's what you want. We'll give you options.

Joanna: Yeah, that is such a good point. And I guess it helps, you know, and perhaps that will help us have the point of rounding out the conversation here, that shareholders agreements, giving you the opportunity to set the parameters of this relationship, that you're embarking on together all may have an impact on, you know, 10, or 20 years ago, if you're coming to this a little bit late, but it's never too late to put it in. You've not got it in place, and you've got an existing organization with other shareholders at the moment, and you haven't got one in place, or you can't remember where it is, and you can't find it, because that's also highly unusual, you know, even if you think is on one day, but no one can actually find it, which happens. You know, it's super important that what Claire said, there's a fabulous saying, Claire, hopefully, you'll know it, that right at the beginning of the business was a perfect time but the second perfect time is right now to do all of these things.

Claire: I didn't know that long, but I'm gonna keep that one.

Joanna: It's I think I've adapted some sort of, you know, monks saying about life more, but anyway, whatever, you know, very true for a legal document, but

Claire: you had a nice disclaimer there that you added, I like to give approval.

Joanna: But, you know, so if you've not got it in place, hopefully, isn't too late. It's one of those things that, you know, we recommend to our clients to undertake regular, you know, and at least annual reviews of their organization, when they think about the adequacy of the legal framework and foundations that they have in place for where their business is, at the moment. And one of those is checking on your shareholder's agreements are any of the other agreements that govern your relationship, in relation to structure and your relationship with your other partners in a business. Make sure it's in place number one, and if it's not in place, get it there, but also review it, you know, because things can change. And I think it's really important that you know, you don't have to go through it word for word, but I think it's really important just to have a brief review of this. And every now and again, at a specific point in time to make sure it continues to represent the business as it is now.

Claire: Totally. So absolutely agree with that.

Joanna: Do you have any other rounding out thoughts? their claim?

Claire: It's not a mandatory doc Jo. What I mean by that is you don't have to have a shareholders agreement. Just like when you get married, you don't have to have a prenup. But we're here to help. From our point of view, they're very important documents. We'd rather sort stuff out for you early. Then later on down the track when

your relationship has gone pear-shaped. We can try and fix it for you when it's gone. pear-shaped, but it's better if we can get in early, as you say when everybody likes each other. But again, it's got to be a quality document. Yes, you want to make sure that your rights are protected. And it doesn't have to be a 50-page document. I made that comment earlier. They usually do go for about 30 or 40 pages, I have to say doesn't have to be really, really complicated, but it does need to deal with the fundamental issues and we can help you and advise you on those fundamental issues. That's the sort of stuff we love doing. And we also love reading the inside of the box.

Joanna: Claire what a fabulous way to leave this we might have to throw in a few pictures of Monopoly boxes. They are awesome now listeners,

Claire: Bags banker. I love being banker when I play Monopoly.

Joanna: I love it. Claire, thank you so much for joining us on the podcast.

Claire: My pleasure.

Joanna: And that's it for this episode of Talking Law, where we talk to all about shareholders agreements. Now if you'd like more information about this topic, head over to our website at www.talkinglaw.com.au where you will be able to download a transcript of this episode. If you're the kind of person who likes to read these transcripts in finer detail. Then you'll also be able to find details of how to contact Claire and our other legal Eagles at Aspect Legal if you or your clients would like to discuss any aspects of shareholders agreements. And that's it. If you enjoyed what you heard today, then please pop over to iTunes and leave us a review, and of course, don't forget to hit subscribe on your podcast player so we can be delivered to your phone each time we release. Thanks again for listening in. You've been listening to Joanna Oakey and Talking Law, a podcast proudly brought to you by our commercial legal practice Aspect Legal. See you next time.