

## How do you transfer control of your family company?

If you hold assets in a family company, or operate a business through a family company, you must think about what will happen to the company in the event of your death.

A family company can continue to operate well beyond your death. The assets in the company are not part of your estate and are not governed by your Will. However, your Will may need to provide direction about who will inherit your shares in the company, as this may affect how the company is controlled after your death.

### A separate legal entity

Throughout your lifetime, there are a variety of ownership structures that can be used to assist with protection of assets, tax effective distribution of income and transfer of control of assets. Family businesses are often operated through a private company structure in which the shares are issued to family members and the office holders are family members.

It is important to remember that a family company is a legal entity in its own right, separate to its shareholders. Although the shares issued in the company are owned by the shareholders, they do not own any of the assets held by the company.

If you are a shareholder in your family company, the company's assets do not form part of your estate and cannot be left by you in your Will.

When determining how you will transfer control of your family company in your estate, you need to take into account how a private company is structured and governed. These matters are documented in the company's constitution (also known as memorandum and articles of association). Please note that the constitution may have been amended since incorporation by special resolutions of the shareholders.

### Issued shares

A company can have several classes of shares on issue. The classes of shares may carry different voting rights and different rights to receive dividends and participate in the liquidation of the company.

Shares in a family company may generally be left to beneficiaries in your Will. When planning how your estate will be distributed, you need to consider who will gain control of the family company upon your death, either by becoming the majority shareholder or through ownership of a class of shares with additional voting rights.

However, you should also be aware of any rules in the company's constitution regarding the transfer of shares. If there is a conflict between your Will and the company's constitution, the constitution will prevail. For example, the constitution of your family company could give the surviving shareholders the right to purchase the shares of a deceased shareholder. In this case, the constitution will override a gift of the shares to a beneficiary. Similarly, any shareholder's agreement will override the operation of the Will.

### Company officers

The directors and secretary of a company are its officers. They need not be shareholders of the company. Directors are responsible for managing the company and the secretary keeps the company's records and arranges meetings. Many companies have at least two directors and one secretary, but single director companies are also common.

As company officers are appointed by shareholders, generally a shareholder who has a majority of the votes has ultimate control over the appointment of those who run and manage the company. When planning your estate, you should ensure that the beneficiary of a controlling stake in your family company is someone who is competent to take on this role and can be trusted to make appropriate appointments.

## Loans

During its operation, if you have deposited personal funds into a family company, then this often creates a loan from you to the company. Loans may also exist between the company and its shareholders if dividends have been allocated to shareholders but have not been paid by the company.

Although the assets of your family company do not form part of your estate, loans by you to the company are an asset of your estate that can be called upon by the executor of your estate. When your Will is prepared, care must be taken to ensure that your death will not create a sudden need for the company to sell significant assets in order to repay the loan to your estate.

If you have withdrawn funds from a family company as a loan, this will generally be a liability of your estate and will need to be repaid to the company following your death. The impact of this liability on your estate also needs to be carefully considered as part of the estate planning process.

### Would you like further information?

For further information please contact your AET estate planning specialist on **1800 882 218**.