



Succession planning



“Succession planning – protecting your business, your estate and you”

You may be surprised to hear that in a recent Family Business Australia survey less than 30 per cent of family businesses indicated that they have a formal succession plan in place.

The failure to properly prepare for an owner's retirement, or unexpected departure due to ill-health, greatly reduces the chance of a business surviving the transition to new ownership or management. If appropriate measures haven't been taken, significant difficulties can also occur where a business owner loses capacity due to disability or illness.

Issues that commonly arise from the absence of an adequate succession plan include:

- exposure to unnecessary capital gains tax (CGT) and stamp duty liabilities;
- uncertainty and suspicion developing amongst family members about their future role in the business; and
- the potential for one or more family members to subsequently oust a sibling or other close relative from the business.

With proper planning, these problems can be diminished or avoided altogether. If appropriately structured, opportunities may also exist to apply the small business CGT concessions to reduce or eliminate CGT on the disposal of business assets and to take advantage of stamp duty exemptions if any land needs to be transferred.

To develop a successful succession plan, the existing legal structure of the business requires a thorough examination. This includes:

- undertaking a review of the constitution and share register if the business is operated through a company;
- scrutinising the governing deed where the business is held under a trust.

The financial accounts of the relevant entity should also be analysed.

A Will plays an important role in succession planning and therefore needs to be kept up-to-date. Regularly reviewing your Will provides the opportunity to reconsider your choice of executors and to assess whether the gifts you intend to make remain appropriate. Where a Will operates imperfectly, the beneficiaries are frequently left to decide amongst themselves how the deceased's assets should be distributed. Apart from providing the opportunity for family disputes, this causes CGT and stamp duty liabilities that could otherwise be avoided.

Although it's not possible to prevent a disgruntled family member from making a claim pursuant to the *Inheritance (Family Provision) Act 1972* (**Family Provision Act**), there are ways of minimising the success or effect of such a claim with proper planning. For example, superannuation, jointly-owned assets and assets held on trust are all able to be put beyond the reach of the Act.

Finally, while you remain healthy, mentally aware, and in full control of your affairs, it's also appropriate to consider planning for the possibility of losing capacity due to disability or illness. Various instruments exist that enable trusted family members or friends specifically chosen by you to make decisions on your behalf in the event of a loss of capacity, namely:

- an Enduring Power of Attorney – this covers property and financial matters only;
- an Advance Care Directive – this covers decisions regarding your future health care, end of life, preferred living arrangements and other personal matters and replaces any existing Enduring Power of Guardianship and Medical Power of Attorney.

If you require expert assistance developing your succession plan, please contact Briony Hutchens from DW Fox Tucker Lawyers on +61 8 8124 1821 or briony.hutchens@dwfoxtucker.com.au.

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