

Legal Alert

Wills, Estates & Succession Planning

February 2020

How to Create a Succession Plan

In a Nutshell

It may not be possible to please everyone, solve every problem or to ensure the buy-in of all parties at the outset. The aim is to document a succession plan based on existing circumstances, highlight problems, and work over time to find long-term solutions.

The Succession Plan

The objectives of a good succession plan are:

- to manage the succession of the ownership and management of a family business to the next generation;
- to be fair (as far as is possible!)
- to provide clarity and certainty
- to minimise tension and division in the next generation
- to avoid inheritance act claims against a deceased estate
- to protect the assets of the business
- to protect the business against bankruptcy or marriage breakdown
- to enable the current business owners to retire
- to minimise tax
- to retain simplicity wherever possible
- to minimise cost

Usually the need for a succession plan arises when the current owners of a business wish to take a lesser role, retire, or ensure that on death the business passes into the most appropriate hands. Occasionally the process begins following an experience of conflict, or to manage the threat of imminent future conflict.

Communication is key. It is imperative to involve the next generation to ensure that all parties are heard, and their views and concerns about the business and their own positions are taken into account. This engenders a perception of fairness, transparency and certainty, and manages expectations.

To ensure that the agreed succession plan then works, the business structure must be reviewed and updated to a more appropriate structure if necessary, and written processes and effective documentation put in place.

4 Steps to Planning and Creating a Succession Plan

Step 1: Open communication

Many families find this step the most difficult. To give the process the best chance of success it is usual for an adviser to meet with the current business owners in the first instance, to review the structure of the business and ascertain who has an ownership or controlling interest, acts in a day to day operational management role, or sits as a director in a strategic governance role.

One or more of the next generation may have an ownership, management or governance role in the business, and one or more may wish to take up such a role in future.

The current owners can confirm whether they want to step back, retaining some involvement and control, relinquish ownership and involvement entirely, or continue in the business and plan for succession on death.

Once this detail is known, if possible, the next generation should be brought into the process, including those who have no involvement in the business and seemingly no interest. Never assume that the next generation do not expect to benefit equally, regardless of who is involved or not involved in the business. It is imperative to establish a process to engage with all current owners and the next generation, either together or individually, to ensure that they understand the current business structure, and confirm their aspirations and expectations.

Step 2: Reach the best agreement possible

When all of the stakeholders have clarified their positions, further meetings will be necessary to reach an agreed outcome. It may not be possible to accommodate everyone within the business, or benefit all of the next generation equally, but by having an honest discussion, all parties will understand the issues, feel heard, and there should be no nasty surprises.

Step 3: Put in place a written Succession Plan and supporting legal documentation to achieve the outcome

The Succession Plan must be properly documented and implemented. Ongoing communication is critical to ensure that the process remains open and under review, and that any changes of opinion or circumstance can be accommodated.

Legal documents such as company constitutions should be reviewed to ensure that the correct rights as to voting, dividends and capital on winding up attach to shares, and eligibility to be and remain a director is clear. A shareholder agreement can often more flexibly deal with such issues, along with the rights of shareholders. Family trust deeds should be reviewed to ensure they are fit for purpose, and varied if necessary subject to trust powers so as not to create a resettlement and a potential tax liability. Unit trust deeds should be reviewed, along with any unitholder agreement. Wills should be put in place to deal with assets which fall into the estate, for example company shares (including shares in corporate trustees), and to properly pass control of trusts which fall outside of the estate. Super should be considered and dealt with. Enduring Powers of Attorney should be made to ensure that personal, company, super and trust assets can be dealt with on incapacity. Restructure may be advisable.

Step 4: Establish a written Code of Family Business Principles, and regular board, management, shareholder and Family Council meetings, to keep the Succession Plan under review

A Code of Family Business Principles, or Family Charter or Constitution, is a written agreement which records the mission statement of the business, the current role of family members within the business, the involvement or education requirements for future entry of family members to employment, management, governance or ownership, confidentiality obligations, dispute resolution procedures, and includes mechanisms to obtain information and to express views. Ideally this should be reviewed annually.

Directors should have regular minuted board meetings as to strategy. Management should have regular meetings to ensure that they work coherently as a team in the day to day operation of the business. Shareholders should

have at least an annual meeting to be given information about the business and the opportunity to ask questions. A Family Council can be established to provide a forum where certain broader family related aspects of the business can be discussed with wider family members, who can give their opinions. This enables engagement and education of future generations, and is a valuable source of information and ideas for the business.

Contact details

If you have any queries regarding this alert, please contact:

Nikki Owen *Special Counsel*
Nikki.owen@finlaysons.com.au
+61 8 8235 7449

Mathew Brittingham *Partner*
Mathew.brittingham@finlaysons.com.au
+61 8 8235 7458

Will Taylor *Partner*
Will.taylor@finlaysons.com.au
+61 8235 7421