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Let's chat

Business succession refresher – August 2025

With:

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Information provided is general in nature; precise application depends on specific circumstances

Attention: Queensland Trust

- 1 August 2025
- 125-year perpetuity periods
- Review the deed whether vesting date can be updated
- Chat Legal trust deeds updated for 125-year trusts from 1 August 2025
- Question whether deed needs to be updated now or later
- Answer different from a trust set up in the 1980s compared to a trust set up in the 2010s

Electronic signing in Queensland

- Ensure document is an agreement or a deed
- Corporations law allows electronic signing by companies
- Queensland legislation allows electronic signing of deeds by individuals without a witness
- Ensure appropriate provisions included in Queensland deeds (such as enabling counterparts)
- **Beware:**
 - If parties located in other States (some do not accept electronic signing of deeds, others have stringent witnessing requirements)
 - If involving substantial sums or between unrelated parties

Flexibility

- How flexible do you want to leave things?
- The more 'set in stone', the more complicated it is to implement
- War stories
- Practical examples (too particular to a detriment and controlling the uncontrollable)
- Potential alternative – a guideline document?
- Trusting people
- If untrustworthy, keep things simpler, appoint more people or include independent persons?

We have discussed giving assets directly compared to passing control. There are benefits in passing control, but also disadvantages.

Flexibility – questions to consider

- Do you want to leave some ‘guidelines’ or ‘rule beyond the grave’?
- If ruling beyond the grave, we will simplify things to remove any potential for abuse of power.
- If leaving some ‘guidelines’, do you trust those in control to **not** abuse their power?
- Think – if the persons in control *could* take all the assets for themselves, do I trust them **not** to?
- Should I appoint multiple people or an independent person(s)?
- Importantly, do I trust those in control to consider my guidelines and act in the best manner possible?

This ‘guideline’ document is called a ‘memo of directions’, and we provide you with a template to complete at your leisure.

Memo of directions

- This document allows you to document your intentions and guidelines
- It could be a blank piece of paper, or the template that we provide you
- It allows you to outline your thought process without fear of making things too restrictive with wording able to be 'lax' and personal
- Those looking after your affairs will at least then have a document that they can refer to when looking after your affairs
- It allows you to leave some non-binding directions so those in control can administer things per your intentions or administer things in a different manner if your directions are not appropriate at the relevant juncture (we are not mind readers and do not know what the future entails)

Ruling beyond the grave – what can go wrong?

- ‘Control must be passed to my children once they turn 18/21/25’
- ‘You cannot sell any property until my child turns 21, has graduated and worked full time for a year’
- ‘You must obtain financial planning advice each year’
- ‘You cannot sell the family home until the children are in control’
- ‘You must give x amount of money to the person who cares for my dogs, and that money has to be spent on my dogs’
- ‘You must distribute my properties as follows:
 - Home to Child A
 - Investment Property 1 and 2 to Child B
 - Investment shares and superannuation to Child C’

Ruling beyond the grave – what can go wrong?

- ‘Distributions each year as follows:
 - \$300,000 to my wife if she is living
 - If she is not living, then \$150,000 to each of my two children
 - If any of my children are not living, then \$50,000 to such of their children (provided a parent is still alive) or \$100,000 to such of their children (if there is no surviving parent)
 - Distributions varied depending on if value of trust fund exceeds 3% (100% of above distributions), 0% to 3% (reduced by 1/3), falls up to 3% (reduced by 2/3) or falls over 3% (no distribution)
- Beneficiaries cannot do a host of trust powers to enable ways to circumvent above rules (i.e. no related party loans or investments)
- No ability to vary the trust except for a particular year when the kids are in their 60s.
- Independent advisor must be included in the decision making as well’

Business succession - company

- Directorship
- Shareholding
- Company constitution
 - Tailored power to appoint director
 - Director/shareholder bespoke requirements
- Power of attorney appropriate
- Shareholders agreement/buy sell deed (discussed further below)

Business succession – discretionary trusts

- Trustee – who makes day to day decisions
- Appointor – who can change the day to day decision maker
- Default beneficiaries – what happens if the day to day decision makers do not agree
- Read the dead (for quirky clauses – see below)
- *Staley v Hill Family Holdings Pty Ltd* [2025] QCA 95
 - Appointor or Trustee
 - Older example - *Mercanti v Mercanti* (2016) 50 WAR 495

- (e) on and following a change in a trustee where the Trust Fund includes an interest in dutiable property as that term is defined in the *Duties Act 1997* (NSW) or the *Duties Act 1999* (ACT):
 - (i) Trustee that is a successor Trustee; and
 - (ii) any continuing Trustee while they remain as Trustee; and

without the necessity of the execution, filing of any instrument or any further act.

- 33.7 Any new trustee, continuing trustee or Successor Trustee shall irrevocably be excluded from being a beneficiary of the Trust Fund from the time that the appointment of the new trustee or Successor Trustee takes effect.

34. _____

may be exercised by the legal personal representatives of that sole Trustee.

- 12.4 The Trustees may, notwithstanding any other provision in this Will, appoint a company to be a sole or Co-Trustee of the Trust if the Trustees appointed under the Will are the only directors of the company and the articles of association of the company are such as to ensure that the directors, during the continuance of the company's trusteeship of the Trust, will be such persons as, in the absence of the company's trusteeship of the Trust, would have been the Trustees appointed under the Will.

REMOVAL AND/OR RESIGNATION OF TRUSTEE AND NEW TRUSTEE

B.(1) A Trustee of this Trust may be removed by notice to it in writing giving the name and address and description of the new trustee to be appointed in its place and stead and such notice may be given jointly under the hands of any two of the three most senior persons surviving and who are eligible beneficiaries as defined in clause 1E (iii) and (iv) of the deed and shall be in writing and posted by prepaid registered post at the last known address in the Commonwealth of Australia of the trustee for the time being of the trust.

Example 1

- Husband and Wife
- 2 biological children
- 2 children from prior relationship
- All over 18
- 2 family trusts
- 1 company with individual shareholder (husband)
- 1 self-managed superannuation fund

Example 1

- 1 child from previous relationship and 1 child from both Husband and Wife
- Independent advisor appointed
- Consider risk of corporate structures without bespoke provisions

Example 1 - discussion

Example 2

- Husband and Wife
- Son aged 20
- Daughter aged 16
- Multiple trust and company structures

Example 2

- Such children appointed over 18 appointed jointly with Husband's Sister
- Risk should anything happen before daughter turns 18

Example 2 - discussion

Example 3

- Husband and Wife
- 4 adult children with their own families
- 1 child on 'bad terms'
- Other 3 children on good terms
- 1 particular child heavily involved with 'the family business'
- Multiple trust and company structures
- Protecting wealth for lineal descendants (excluding child on 'bad terms')

Example 3

- Significant debt held within the group
- Risk of family fracture
- No independent advisors involved

Example 3 - discussion

Where there are unrelated parties

- Shareholders agreement
- Buy sell deed
- Other commercial agreements (joint venture agreements etc)
- Ensure we know what happens if one or more key people cannot act
- Not always just death, but loss of capacity/'TPD'

Buy sell deeds

- Not mandatory until trigger events occur
- Even upon trigger events occurring, options are optional on being exercised
- Deemed market value substitution rules

Buy sell deeds

- Self-funded insurance
 - Goldilocks
 - CGT exemption
- Cross-insurance
 - No CGT exemption on 'non-death' payouts
- Company
 - Various tax issues on ensuring funds paid out to affected shareholders
- Special purpose trust
 - Achieves what is required but more complex due to the need to establish a special purpose trust

Buy sell deeds

Self-managed superannuation fund

- Binding death benefit nominations
- Tax considerations
- Flexibility compared to certainty
- Who would operate a business from a self-managed superannuation fund?
 - Story time

Takeaway

- Got entities?
- Not so simple
- Reasonable to expect solicitor to charge to review the complexities that may arise (haven't touched the really complex aspects)

Contact details

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