



What happens to your business when you pass away?

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For many business owners, your business isn't just a livelihood - it's a legacy. But what happens to that legacy when you're no longer around to lead it? It's not something most of us like to dwell on, but planning for the future of your business after your passing is just as important as planning for its growth today.

Without a clear [business succession plan](#), your business and its stakeholders may face significant disruptions and challenges.

In this blog, we explore the various considerations for business succession planning specific to your business structure. We'll look at succession planning for:

- sole traders;
- partnerships;
- companies; and
- trusts.

Sole trader

As a sole trader, your business is legally indistinguishable from you.

Upon your death, all business assets and liabilities become part of your personal estate and subject to the terms of your Will. Your executor will be responsible for managing these business assets, including deciding whether to sell the business, continue operations temporarily, or wind it down based on what benefits your estate and your beneficiaries the most.

For most sole traders, a [Grant of Probate](#) would be required for the executor to administer the business assets. This could create delays in the executor being able to access and administer the business assets.

Without a succession plan, including the selection of the [right executor for the role](#), the business may face operational disruptions or cessation. In some circumstances, this may significantly affect the value of the business assets and, therefore, the value to your estate and your beneficiaries.

Partnerships

In a partnership, the fate of the business after a partner's death largely depends on whether a partnership agreement exists.

Without a partnership agreement

If the partners have not entered into a partnership agreement, then under the *Partnership Act 1892 (NSW)*, the partnership may dissolve automatically, potentially leading to asset liquidation or sale.

Due to this dissolution, the surviving partner or partners may be personally liable for some liabilities of the partnership, including accrued employee entitlements and tax obligations.

The surviving partners must also account to the deceased partner's estate for their share of the business as at the date of death. Without adequate planning, this can be financially burdensome at a time where the surviving partners have also lost a key contributor to the business.

With a partnership agreement

Provisions in a well-considered and detailed partnership agreement should cover what occurs in the event that one of the partners of a partnership passes away. This can include whether the remaining partner(s) can buy out the deceased partner's share, whether they are required to buy out the deceased partner's share, how the deceased partner's share is to be valued, etc.

The partnership agreement can help to manage the effect of the death of one partner, both for the benefit of their family and for the surviving partner(s). A well-drafted partnership agreement is vital to prevent uncertainties and protect all parties involved.

Companies

Companies are separate legal entities from the individual shareholders and directors, which means that the company does not cease to exist upon the death of a shareholder or director.

However, the death of a director or shareholder, particularly for private companies with limited numbers of directors or shareholders, can have significant consequences for the company, and the succession outcomes will often depend on existing agreements and company constitutions.

Shareholders

Shares owned by the deceased will become part of their estate and, therefore, subject to the terms of the deceased's Will. The executor transfers these shares according to the Will or [intestacy laws](#), potentially introducing new shareholders to the company (i.e., the deceased's beneficiaries). For private companies operating small to mid-size businesses, this can result in individuals owning the shares in the company who have limited knowledge of or contribution to the business the company controls.

Without a shareholder's agreement or buy/sell agreement in place, the family or beneficiaries of the deceased shareholder may be required to negotiate with the surviving shareholders of the company. This can mean forcing the executor, family or beneficiaries to negotiate a share sale with the surviving shareholders.

A shareholder's agreement or buy/sell agreement can help guide the obligations on both the estate of the deceased shareholder and the obligations on the surviving shareholders of a company.

This can help streamline the valuation and sale process so that the deceased's family receives payment of the value of the shares. It also allows for the surviving shareholders to take control of the company without the need to work with the deceased's family, who may have limited knowledge and experience in running the company and business.

Directors

The company's constitution typically outlines procedures for replacing a deceased director. If a shareholder's agreement has been prepared, then this, too, may outline the process for the replacement of a director. Without clear guidelines, disputes may arise, affecting company stability.

Preparation of a shareholder agreement, particularly for companies with two (2) or more shareholders, is essential. Proactive planning ensures smooth transitions and maintains business continuity.

Trusts

Trusts are common in business structures for asset protection and tax planning. Every trust is different and will depend on the terms of the particular trust deed.

If the trustee of the trust is an individual, then the impact of a trustee's death depends on the trust deed:

Trustee's role

The trust deed usually specifies the process for appointing a new trustee upon the current trustee's death.

Appointor's role

Some trusts will include an appointor role. The appointor usually has the power to appoint or remove trustees. If the appointor passes away, the trust deed should outline who becomes the replacement appointor, which may assist the appointor in nominating their successor under their Will.

It is essential for any business owners who operate their business through a trading trust to review the terms of the trust and ensure it aligns with their own estate planning documents.

Key considerations for business succession planning

There is no 'one size fits all' approach to succession planning for a business. To safeguard your business's future and provide clarity for your beneficiaries, consider the following steps:

Create or update your Will

Clearly outline how your business interests should be handled under your Will, ensuring alignment with other legal documents.

If you have other co-owners in your business, you should also encourage them to ensure their [estate planning documents are regularly reviewed](#) as if something were to happen to them, it can create uncertainty for you when dealing with their family.

Draft comprehensive agreements

Particularly for partnerships and companies, proactive planning is essential to ensure certainty for both your family and your co-owners. You and your co-owners should ensure your agreements detail procedures for succession to guide what occurs if one of your co-owners unexpectedly dies.

Regularly review documents

Life circumstances and laws change frequently. Regular reviews of your estate planning and legal documents ensure they remain relevant and effective. This can include your and your co-owner's Will, other estate planning documents such as [Powers of Attorney](#) and [Appointments of Guardian](#), and other business agreements.

Consult professionals

Engage with legal and financial advisors experienced in business succession to tailor a plan that suits your unique business and situation.

Planning for what happens to your business if the unexpected occurs is beneficial for your family, your business partners and co-owners, and the legacy of your business you have worked so hard to build.

Get help from a lawyer experienced in estate planning

While this guide provides a general overview of some matters to consider for succession planning for your business, it should be noted that each situation is unique. Speaking with a lawyer experienced in both estate planning and commercial law can help you navigate the legal and financial complexities of managing the succession of your business.

E&A Lawyers have a dedicated and experienced estate planning team who can help you. For more information or to arrange a consultation with a lawyer, you can call or email us.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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