

Successor Directors: What Happens if a Director Dies or is incapacitated?

What happens to your Companies if you die, get sick, are litigated against, or become bankrupt?

There are almost 3 million companies in Australia, and many are used by small businesses to trade. For others, companies act as trustees for a discretionary family trust or a self-managed super fund. However, what happens when the director of the company, trading or trustee, dies or becomes incapacitated?

- Will the business fail?
- Will it go into long, slow hibernation until Supreme Court legal action is taken to install a director or new trustee?
- Will existing directors take advantage of the company?
- Will lawyers seeking to claim against the estate lock up the company or put their favourite director in?
- For SMSFs, will the ATO install their directors?

Any of the above reasons can spell disaster for a company, trust, or SMSF. We have seen cases where a company was run into the ground quickly because there was no director, and the accountants and lawyers did not realise that the director's will was ineffective in appointing a continuing director.

For this reason, we advise company clients to appoint a successor director so that the company can continue to operate.

What is a Successor Director?

The company constitution and rules (not the Will or any enduring power of attorney) may provide for a person known as the Successor Director to take over from a sole director or a director on a Board when the current director is sick, dies, or is subject to litigation, including divorce or bankruptcy. The current director is automatically removed, and the Successor Director is appointed.

Case Study

John Smith runs his trading company as a sole director. He has ten staff members and is very hands-on, but his staff knows what to do to keep the business running. He is also the director of the trustee company for his family trust and self-managed super fund. John dies in an accident and leaves behind a business, a wife, and two young children.

John's family wealth and all of his structures are exposed. Who will pay the bills? Will his family be able to access any money — even for the funeral? And this is only the tip of the iceberg — wait until the bank starts to threaten foreclosure on the family home due to a lack of funds.

But John's accountant has implemented the Successor Director solution for all his companies. On John's death, his brother Nigel was appointed as Successor Director the next day to ensure an orderly transition of business, the family trust, and the SMSF. The funeral is paid for, and ongoing income is paid to the family.

What is involved?

To implement the Successor Director solution, we need to first upgrade your company constitutions to enable the Successor Director. Then, we complete a binding resolution, signed by the current director or directors, which will auto-install the successor director in the event of death, disability, bankruptcy, litigation, or any other reason. There is no need to inform ASIC at this time, but if it is used, then ASIC is an important cog in the wheel.