



Protecting against the Sole Director Trap - Danger

With Grant Abbott, Abbott & Mourly
Lawyers and Michael Jeffriess - Director
LightYear and Accountis



11 October 2022



Where to find replays, upcoming events and all important issues - broadcast

Good Morning,
Grant Abbott

surge

 Your Team

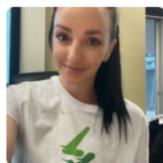
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LYD Announcements ⚡
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● Available

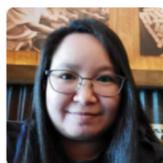
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Ashleigh [Management]
Director

Last seen: 19h ago

20



Cris [Admin]
Admin Assistant

● Available

9



 Get Support



Live Support
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0

 Requests



0 Open Requests
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 Meetings

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No Upcoming Meetings

Problems with a Directors

- If you act as a Director of a company and become incapacitated, are sued or upon your death, wherever the company resides is in significant problems
- This is because your directorship ceases when you are incapacitated or die, and personal liability may rein in the company for your personal legal issues
- Alternative Directors lapse on death
- ASIC, the Australian companies regulator has issued a guidance statement Info 73 that provides a warning to directors and especially sole directors and sole shareholders. See part of that guidance over

ASIC guidance Info 73 on Directors

During that period when there is no director, the company may be completely unable to operate. With no-one properly authorised to make management decisions or act for the company, it may be unable to trade. Banks and other financial institutions in particular may be unwilling to accept instructions in relation to a company's trading account if they are not satisfied there is someone properly authorized to act for it. Equally, staff and suppliers may not be able to be paid, which can quickly have a deleterious effect on the reputation and value of the company to the beneficiaries of the estate.

SMSF Statistics

Table 4: Proportion of funds by number of members (%)

Number of members	2019–20	2018–19	2017–18	2016–17	2015–16
1	23.7%	23.4%	23.2%	23.1%	22.9%
2	69.2%	69.3%	69.4%	69.4%	69.5%
3	3.4%	3.6%	3.6%	3.7%	3.7%
4	3.6%	3.8%	3.8%	3.8%	3.9%
Total	100%	100%	100%	100%	100%

SMSF Problems with a Sole Director

- Section 17A(2) of SISA provides that a single member SMSF is required to have either a corporate trustee where the sole member is the director or another person becomes a trustee in addition to the single member trustee of the fund.
- For single member SMSFs that have a corporate trustee what happens when the sole director dies?
 - If the adviser has not set in place a Successor Director solution, enabling the Executor of the deceased member's estate to become a Director in place of the deceased member director – as per section 17A(3)(a) of SISA, the corporate trustee has no ability to act and is rudderless.
 - The result may be that this leaves the Fund with no trustee and as a result the fund may breach section 19 of SISA thereby precluding the fund being a regulated superannuation fund.
 - If the fund is not a regulated superannuation fund, then section 42A of SISA would render it a non-complying superannuation fund .

Discretionary Trust Problems with a Sole Director

- If a sole director of a discretionary trustee company passes during the income year and is not replaced what happens?
- The Trust is rudderless – if there is no director then:
 - have to look at the appointor to replace the Trustee, or
 - the Executor of the Will can appoint a director unless they are under pressure under a family provisions claims
- If no director what happens to the making of distributions at year end? As we know if there are no distribution the Trustee is taxed on income at 47%
- If there is no Trustee at what point is there no Trust anymore? Need to hightail it to the Supreme Court to get a court appointed Trustee!!!

Why LightYear Docs is pre-eminent

- Three components of the Successor Director solution:
 - Ensure constitution has appointment power
 - Binding contingent directors resolution
 - Deed of indemnity – why would you become director without?
- Lawyers in tune with the Successor Director solution charge \$2,000 or more for the solution
- No other on-line provider offers the Successor Director solution at inception – set up sole directors without fear or favour
- Put in place now and upgrade constitution, can keep existing classes

The LightYear Docs Successor Director Solution

45.5. Any Director may request the Board of Directors to put in place a binding resolution that a Successor Director will take the requesting Director's position as a Director, with full rights, entitlements and privileges that the position ensures. The binding resolution to replace the requesting Director is to lay out the circumstances as to when the Successor Director is to replace the requesting Director and may include that the requesting Director cannot manage the Company because of mental incapacity, becomes bankrupt or dies. In addition the personal representatives or trustee of the person may appoint a Successor Director.

Warning for Accountants

- RE Owies [2022] VSCA 142 has a warning on named beneficiaries and distributions in cases where one is favoured over others!
- *KYROU, NIALL and WALKER JJA: "The nature of the trustee's power is not an exact counterpart to the interest of a parent. The purpose of the trust was to provide for the primary beneficiaries in an even handed, impartial way, in a fashion that is more constrained than the whims, passions and strong feelings, both favourable and adverse, that can underpin a parent/child relationship."*
- Be careful with trust distribution resolutions and best by far switch to **Leading Member discretionary trust** which does not have named beneficiaries!!!

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