

The majority of Australian farms are owned and operated by family businesses, and many of them have been passed on from generation to generation. Whether you are thinking long-term or approaching retirement, it is important to have a succession plan in place to ensure that you are operating your business through the most effective structure that gives you the flexibility to pass your farm onto your children or other family members in the future.

WHAT IS FARM SUCCESSION PLANNING?

Farm succession planning involves putting in place a plan to give effect to your future intentions in respect of your family farm. This may involve ensuring that the farm will be transferred to your children, a friend or another person on your retirement, and having structures in place so as to give you involvement in key decisions after you stop actively working on the farm. Your plan should be well thought out and manage contingencies, such as what happens when you retire, become sick or pass away.

Having a well thought out plan that all members of the family are on board with (or at least aware of), will help to minimise the risk of disputes and ensure the smooth transition and ongoing profitability of the farm in the future.

Ideally, farm succession planning should be done in conjunction with your accountant. At Beck Legal, we work as a team with your accountant in order to ensure that everyone is on the same page and your legal structures are tax effective.

HIGH-LEVEL SUCCESSION PLANNING PROCESS

At a high level, farm succession planning involves:

1. deciding on your retirement plan;
2. identifying your successor/s;
3. determining how you will gradually transfer control to your successor/s; and
4. reviewing your structures from a tax and succession planning perspective.

RETIREMENT PLAN

This involves determining how much money you and your partner (if any) need to retire and then working backwards from there. This should give you a good idea as to when you will be in a position to retire, although your financial calculations should take into account contingencies such as droughts.

IDENTIFYING A SUCCESSOR

It can be difficult to identify a potential successor early on, as these days it is more common for kids to go to university and get experience in another job before ultimately returning to the family business. It may be that you are unable to identify which of your children will ultimately end up working on the farm at the time you initially do your

succession plan, however your succession plan should be flexible and be able to develop and evolve over time as the future becomes clearer.

When identifying successors, you should ask yourself the following questions:

1. Who in the family has the practical experience to run a farm and/or a business, or what can you do now to ensure that there will be someone who has that expertise in the future? What steps can be taken to ensure the identified successor will be able to run the farm when you are no longer there?
2. Is there more than one successor? How are you going to divide the farm between successors? How can you minimise the possibilities of conflict? We can assist with identifying different structures and strategic approaches which will reduce the risks of conflict between siblings and other family members.
3. If there are no family members available to take over the farm in the future, who are you going to sell the farm to? How are you going to find a buyer? There may be neighbours or others in the same or similar farming industry as you who are interested in acquiring your farm for strategic purposes. There may also be interest from larger corporates or foreign buyers, depending on the size, profitability and industry of your farm. If this is of interest, you should consider what steps you can take now to increase the value of the farm to a potential buyer. This will include determining if you are holding your family farm in a legal structure that is attractive to a buyer.

Depending on the situation, you should generally discuss your future intentions with your family openly and frankly and ensure that any identified successor/s are on board with the plan and understand your expectations.

REDUCING YOUR CONTROL & INVOLVEMENT

There will come a time when you need to start handing over control of your farm to your identified successors. The reasons for this include enjoying your retirement and keeping your successors motivated to continue working on the farm.

Reducing your involvement in the business you have worked in for most of your life can be difficult, however with proper advance planning, you can undertake the process gradually over time and still ultimately have a say in key decision making in order to ensure the ongoing success of the farm.

As a part of this aspect of succession planning, you should ask the following questions:

1. What ongoing involvement do you want in the farm following your retirement?
2. What types of decisions are important to the ongoing success of the farm that you wish to remain involved in?
3. Do you want to continue to have a share in the future profits of the farm?
4. What impact will your ongoing involvement have on the motivation of your nominated successors?

As part of your succession planning process, we will work with you to understand the control and involvement you want to have in your business in the future and ensure the structures that we put in place for you give you the option to have that involvement if you want it.

TRANSFERRING ASSETS

As part of the succession planning process, we will review your existing structures and future intentions to determine whether your property and assets can be held in a better structure from both a tax and succession planning perspective. For example, it may be that you are better off holding your property in a discretionary trust, which gives you more flexibility to distribute the income and property to different family members each year.

Depending on how your farming land is held, you may be able to transfer the land to your nominated successors in the future without the need for them to pay duty on the transfer if the family farm duty exemption applies. There are specific requirements which must be met in order for this duty exemption to apply.

KEY TAKEAWAY

Succession planning is one of the most important aspects of operating a family farm. It is generally the case that putting plans in place sooner rather than later can assist to manage the tax implications of any restructuring that is required. Beck Legal are trusted advisors to many family farming businesses across Victoria, and we would be more than happy to work with you and your advisors to devise and execute your succession plan.

GUIDE TO RESTRUCTURING AND THE FAMILY FARM DUTY EXEMPTION

Generally, when you transfer property in Victoria to another person they have to pay stamp duty, which can be up to 5.5% of the value of the property. One of the benefits of operating a family farm is the ability to transfer the farm to relatives, such as children, without incurring duty in certain circumstances. This benefit extends to allow family farms to be transferred to, and held in, a discretionary family trust which has relatives of the transferor as the beneficiaries.

WHY TRANSFER A FAMILY FARM TO A TRUST?

It is generally not the most effective option, from either a succession planning or tax perspective, for individuals to hold a family farm in their own name. The benefits of transferring a family farm to a trust are that:

1. It assists with giving effect to succession planning, avoiding the need to pass ownership or control of the land through a Will which is fraught with danger given that Wills can be easily changed and challenged. The trustee of the trust can elect to retain the farm in the trust or transfer it to one or more beneficiaries. Terms can be included in the trust deed in respect of who has the right to appoint a trustee, how decisions are to be made and conditions that must be satisfied in order for a transfer of the property out of the trust to occur. Conversely, if land is held in an individual's own name and dealt with in a Will, the Will may be overturned by a Court which may impose its own orders in respect of how a property is to be dealt with. These orders may be inconsistent with the intentions of the deceased owner and can include land being divided up or sold; and
2. It gives you the greatest flexibility to distribute the profits and tax losses of the farm to the beneficiaries in the most tax effective way. For example, one year you may wish to distribute profits to a beneficiary with the lowest income, and in another year it may be more effective to distribute the profits to an alternative beneficiary.

We often assist our clients with planning the succession of their family farm, which generally involves transferring any family farm held in an individual/s name, a company or a standard discretionary trust to a new discretionary trust that complies with the requirements of the *Duties Act 2000* (VIC) (**Act**) to access the family farm exemption.

FAMILY FARM EXEMPTION

Section 56 of the Act sets out the exemption from stamp duty in respect to the transfer of land used for **primary production** to a **relative**, including through a discretionary trust.

PRIMARY PRODUCTION

Land is considered to be used for "primary production" if it is used for:

1. Cultivation for the purpose of selling the produce of cultivation;
2. The maintenance of animals or poultry for the purpose of selling them or their natural increase or bodily produce;
3. The keeping of bees for the purpose of selling their honey;
4. Commercial fishing, including the preparation for commercial fishing or the storage or preservation of fish or fishing gear; or
5. The cultivation of propagation for sale of plants, seedlings, mushrooms or orchids.

If the land is located outside (or partly within) greater Melbourne and is not within an urban zone, it must be used primarily for primary production. If the land is located within an urban zone of greater Melbourne, the land must be used primarily for the business of primary production, which essentially requires a profit-making venture to be undertaken on the land (whereas this is not necessarily a requirement of land located outside of an urban zone).

RELATIVE

It is critical to understand who is a "relative" under the Act. If the trustee of the trust holding the farming land distributes, or is able to distribute, any component of the capital of the trust (being the farming land) to any person who does not meet the definition of relative, this will render the trust non-compliant and duty will become payable upon any transfer out of the trust.

The Act defines a relative as a:

1. Child (including a legally adopted child) or remote lineal descendant (grandchild, great-grandchild) or partner's child or remote lineal descendant;
2. A parent or remote lineal ancestor (grandparent, great-grandparent) or partner's parent or remote lineal ancestor;
3. A brother or sister or partner's brother or sister;
4. Partner or a partner of any person referred to above;
5. A child of a brother or sister or child (niece or nephew) or partner's brother or sister; or

6. A brother or sister of a parent (uncle or aunty) or a brother or sister of partner's parent.

If you are currently holding farming land in your own name, in a company or a discretionary trust, we can assist you with restructuring into a section 56 compliant discretionary trust

WHAT DOES THIS MEAN FOR YOU?

Beck Legal has advised family agribusinesses across Victoria on the best way to achieve their succession planning goals. The above is only one example which may or may not be appropriate for you depending on your family's goals and circumstances. We endeavour to approach succession planning with a view to giving you the greatest flexibility and certainty possible, and work with your accountant to ensure that the structure we put in place achieves what you are looking for whilst managing and legally minimising the capital gains tax and duty consequences. The family farm duty exemption can, when applied correctly, achieve substantial duty savings.

If you need a review of your current structures to ensure that your family farm is held in the most effective way possible, please contact our commercial and succession planning team today.