

How will well planned successions save the Fishing Business?

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1 Introduction

1.1 What is Family Succession Planning?

Fishing Business succession occurs as each generation attempts to transfer both control and ownership of the family fishing license and the family fishing business from them to the next generation. The concept of transferring the fishing license independently from the fishing business is often misunderstood and is often the cause of both anxiety and dispute between the parties. We believe where succession occurs as part of a measured and carefully executed plan the costs and risks of family disputation are significantly reduced.

Like all well made plans careful research is initially required to ascertain the risks, costs and opportunities. We believe our role is to minimise the risks and cost and facilitate a process to maximise the opportunities offered by successful family succession.

We are believers in the adage of ‘making haste slowly’. In broad technical terms transferring a fishing business and license from one generation to the next is generally straight forward especially given fishing ownership and business trading structures. The most challenging component of the succession process will be attempting to bring a degree of equality and fairness to the outcome between family members.

1.2 Where Are We Now?

The long-term impact on the profitability of the fishery will only be minimised by the capacity of the industry to improve its cost and catch efficiency. This is in direct conflict with the sustainability of the rock lobster resource. Every increment of improvement in fishing efficiency simply adds to the pressure on the regulator to introduce further restrictions to protect fish stocks.

This report adds support to the proposition that the most efficient fishermen are accelerating the introduction of more regulation compounding industry inefficiencies through their ability to catch more. They, in turn, need to catch more to remain financially viable.

The main cost drivers show little sign of easing over either the short or longer term. The recent increase in the lobster price has seen optimism return to the industry. Even if it is assumed that prices will average in excess of \$30/kg in the 2006-07, the season is likely to return lower profits than in the prior seasons experiencing these prices. Neither does it appear that the industry can rely on its good fortune in the late 1990s and early 2000s, when the Australian dollar moved in a favourable direction for exporters.

The industry is also facing challenges with its labour arrangements. The historical method of sharing revenue with fishermen is placing fishing labour in an increasingly unattractive position due to mining and tourism flourishing in key fishing areas. These industries are drawing down the labour pool for the rock lobster industry both in terms of draining the quantum of existing skilled labour as well as the number of new entrants to the labour pool.

If the Western Rock Lobster Industry wished to maintain or improve its current rate of return, it needs to find a management system that allows it to restructure input costs. Similarly, it needs to

consider the prospects of improving its marketing and processing of the product. While it may be arguable value adding product or keener marketer strategies are an alternative, the WRL is an international commodity currently positioned as a price taker rather than price maker. The retirement of more processors may allow increase in economy of scale and reduction in cost duplication.

There is an increasing body of anecdotal evidence suggesting that higher-g geared operators are facing an increasing level of financial stress. Combine this with the aging of the population of fisherman and the cost price squeeze, the trend in the rationalisation of the fishing fleet and the processing sector is likely to continue. If net earnings is used as the basis for valuing pot entitlement reducing profit margins should also reduce the capital value of pot entitlements

1.3 Industry Overview of the Western Rock Lobster

- Average age of active fishermen 47.29 years
- Expected period active fishermen intends to remain in the industry 8.28 years
- Expectation that family will continue in the industry 79.41%
- Fishermen who calculated wages based on share fishing 66%
- Fishermen who participated in pooling at least some of the time 58%

With the average age of rock lobster fishermen being 47.29 years there must be a significant number of fishermen considerably older than this age. There is likely to be either an increasing number of fishermen considering retirement and either liquidating their fishing assets, becoming a non-active fisherman or transferring control of their fishing assets to other family members. This is likely to impact on each fisherman's decision-making process with regard to prospective resource management options. The decision of adopting a particular resource management strategy may be strongly influenced by fishermen intending to simply maximise the value of assets prior to exiting the industry.

Alternatively, 79.41% of fishermen or their families intend to stay in the industry. These fishermen are likely to adopt strategies to maximise their share of the resource. There are some fishermen who will want to stay in the industry because they believe that there are barriers to them exiting the industry, and the industry offers a unique lifestyle. However, the research has shown that the vast majority of fishermen do not want to be under, what they consider to be, the excessive pressure of competition for catch and the increased level of financial pressure from debt generated from pot acquisitions. Fishermen agree that this is a significant weakness of the current effort-control management system.

The popularity of wages being linked to catch could be attributed to combination of a desire by fisherman to reduce the risk of high wages and low catch or may be just a hangover from earlier times when this was the generally accepted method of remuneration.

1.4 Primary Production Tax Concessions

The existence of tax concessions gives rise to opportunities for decisions to be made to transfer a fishing business during the lifetime of the current owners; but there are a raft of other social, economic and other factors to take into account before a decision can be made as to whether those tools can or should be applied.

When we address tax issues for primary producers, we are dealing with a sector of the economy that is singled out for very special, concessional attention in the tax laws. No other industry group attracts the policy benefits that are provided for primary producers, including:

- Income averaging - eligibility for the averaging tax offset; and
- Farm Management Deposits (FMD) Scheme.

1.5 Stamp Duty Concessions

A full or partial exemption from stamp duty is available on the transfer of fishing business property between family members or by a natural person to a discretionary trustee of a discretionary trust, subject to the satisfaction of certain conditions:

1.6 Where to now?

An equitable outcome can best be achieved for all stakeholders in the ‘family fishing business’ through combining:

- Careful planning;
- Open discussion; and
- Professional advice which is timely, practical and makes the most of tax and stamp duty concessions offered to primary producers.

2 Case Study

This is the tragic story of how the Osborne family (name changed to protect the innocent) lost a well-established and financially secure farm in just eight years. This situation occurs in farms across Australia.

In 1986, the Osborne's held one of the best mixed farming properties in their district. The operation of the farm was conducted through the partnership of Reg Osborne, his wife Sally and sons James, Richard and Mark.

Reg and Sally also had a daughter who would have liked to be involved in the farm, but Reg was not keen on her being a partner.

Reg had been meaning to review his Will but did not believe it was a priority - after all he was only 63 and he felt fit and healthy. Longevity was a family trait.

One hot day while carting grain, Reg suffered a heart attack. Within hours he was dead.

What happened then?

This set off a chain of events that would culminate with years of anguish, bitterness and ultimately the loss of the Osborne family farm.

Reg's Will failed to make any provision for his daughter. She contested the Will and eventually settled out of court with the farm paying a substantial sum.

Son Mark decided he would not pursue farming and sold his third share of the farm to his two brothers - a transaction involving considerable expense.

By 1989 the two remaining brothers decided to farm independently and split the land and farm assets. They also had to buy out their mother Sally who insisted on being paid market value because her share of the farm represented her only means of lifelong financial security.

This put the brothers further into debt and liable for more costs, more farm equipment was needed - more debt was incurred.

Tragedy Strikes

A few years later the debt load was all too much for James - he sold up and moved to the city.

Financial and personal pressures caused Richard's marriage to fail and the divorce settlement meant he had to sell too.

Eight years after Reg Osborne's death, the family farm was gone.

What would have secured a happy ending for the Osbornes?

Reg Osborne should have had a succession plan.

A regular review of his Will, the establishment of a Family Trust, adequate life insurance,

making provision for his daughter and arranging some method of ensuring financial security for his wife. These issues should have been addressed before Reg's unexpected death.

Because Reg Osborne was not inclined to seek professional advice, nor discuss succession planning issues with his family, his death led to the demise of the family farm.

It was all so easily avoidable!

3 Fishing Succession Planning

There is a need to start somewhere in fishing business succession planning and that somewhere is usually in discussions between family members. However, involving a professional facilitator from the beginning is recommended.

3.1 The Initial Successful Ingredients

Q What are the ingredients needed for successful family business fishing succession planning?

A Communication between all family members on the subject and the use of a facilitator.

Q Why communication?

A The secret of successful planning is that all family members know the overall situation regarding the fishing business and their own position.

A 'Veil of Secrecy' between family members on the subject breeds distrust, a breakdown in relationships at all levels (sometimes leading to open hostility), disharmony in fishing business operations and a resultant drop in productivity.

There are many reported cases of family fishing business having to be sold to an outside party because of family feuding that could have been avoided if there had been communication in the first place.

Q How do fishermen rate on communication on the issue of the transfer of the family fishing business?

A In the past, generally poorly. A widely reported survey published in 1992 by the University of Western Sydney gave the following percentages on fisherman communication regarding Australian fishing business transfers:

- 42% no discussion with spouse on fishing business asset transfers;
- 63% no discussion with fishing sons on fishing business asset transfers; and
- 84% no participation of fishing daughters-in-law to fishing business asset transfer discussions.

These figures reveal the extent of the communication problem, in particular the daughter-in-law situation. However, there are encouraging signs of increased communication, for instance whole families attending seminars on fishing business succession planning.

Q Why is it so difficult to communicate about the transfer of the family fishing business?

A Partly tradition ("my parents did not tell me I was going to inherit the family fishing business so why should I advise my children"), but more commonly because fishermen know it is a complex and difficult issue and the more family members involved, the more likely discussions will be "heated".

The average fishing business in Australia is a valuable asset and discussions about transferring it give rise to family jealousies, arguments, the individual desire for a "bigger slice of the cake" and member sentiments about the fishing business.

Initiating this sort of family debate is something many of the older fishing generation do not desire - therefore fishing business transfer discussions are not held and as a corollary the Will details, including the bequest of the family fishing business, are not revealed. And on the other hand, the younger generations are often reluctant to initiate discussions, as they do not feel it is their place to commence these discussions.

Q Are there any other reasons for this lack of communication?

A Yes, even in harmonious family groups, the issue of the fishing business transfer is sometimes regarded as too big a problem and is therefore not discussed at all. Familiar situations are:

- Only two viable fishing licenses and three children who want to be fishermen and fishing business debt does not allow the purchase of a third fishing license; and
- The desire to pass on a share of family wealth to non-fishing children, but all assets (and debt) are tied up in the fishing business.

The problem is therefore put in the 'too hard basket' until the fisherman wins Lotto!

Q Why use a facilitator or counsellor?

A The communication issue can be so difficult and the technical areas associated with the fishing business transfer so complex, that the services of a facilitator is essential for most fishing families. Without such a person, family discussions invariably get bogged down. The facilitator or counselor must be neutral, being present at family discussions to encourage discussions and suggest compromise solutions if the parties cannot agree, they act as the umpire.

The facilitator should also act as an unofficial secretary of the meeting(s) and afterwards forward Minutes and/or correspondence of the meeting to all parties.

Q Who is the best person to act in the facilitator role?

A A professional planner assisted by an Accountant, Solicitor or consultant.
A person may be good in the counseling role, but technical expertise in the area of fishing business transfers is vital. The facilitator must have a good knowledge of Stamp Duty legislation, income tax law (especially Capital Gains Tax) and the detail required to instruct on the preparation of legal documents (especially Wills).

Q But using professionals must cost money for fees?

A It does, but this has to be weighed against the cost to the family of non-resolution of the fishing business transfer issue. This is not an issue that can be measured in monetary terms - non-resolution has a high human cost. Professional fees can be expensive especially in complex situations. But this has to be viewed in the context of sorting out a \$1 million problem (the average Australian fishing business asset value).

Q How does a fishermen find the right professional for succession planning consultation?

A By referral from a fishermen's organisation, their accountant, bank manager, a counsellor or neighbour to a qualified professional specialising in fishing business succession planning.

3.2 The Need for a Plan

The need for fishing business succession planning is essential, be it for the short or long term (or both). Without such planning, family members do not know where they stand in relation to the family fishing business.

Q Is there a need for a succession plan for a fishing business?

A Definitely yes. Succession planning can start up to ten years before a family rearrangement (such as retirement) takes place, usually in the area of financial planning. Often the financial position of the fishing business prevents immediate implementation of the plan but general agreement on financial objectives can be reached. These objectives might include:

- Reduction of fishing business core debt;
- Purchase of a major non-fishing asset (e.g. house in the city);
- Purchase of additional fishing property;
- Building a major improvement on the fishing business (e.g. new vessel); and
- Increasing superannuation funding

Q Are there any other factors that may come into the succession plan other than financial planning?

A Yes. It could be an age factor. It could be agreed that the older generation would officially continue on the fishing business until attaining the age of, say 65 years. Another factor

could be the periodic reviewing of Wills, especially those of the older generation.

Q What is the benefit of having a plan?

A The benefit is that all family members know where they stand. If it is agreed that in the future a rearrangement will take place there will be greater family harmony in the intervening period with everybody working towards a common goal. Issues are known and discussed rather than hidden and divisive.

Q How should the plan be commenced?

A After family discussions, preferably using the services of a facilitator, the plan should be noted in writing and all members provided with a copy.

Understandably, being only a plan, it may be changed over the years, due to changing circumstances (e.g. improved/worsening financial position) but it still remains the blueprint for planning. In this context it should be reviewed periodically.

Q Should there be any preliminary work done prior to drawing up the plan?

A Yes, as planning invariably includes a financial factor, it is highly desirable to have a statement of the assets (in other words, the wealth) of each family member and entity (e.g. family trust/company) prepared.

The family accountant can do this. This is a good starting point for the planning discussions, especially in relation to proposed asset transfers. An example of a Family Wealth Statement is reproduced here.

Family Wealth Statement The Smith Family						
	Mr J Smith	Mrs M Smith	Son - Ian	Son - Kevin	Daughter - Kim	Family Trust
Assets						
Fishing License						
Vessel & Pots	300,000	300,000				
Joe's	100,000	100,000	100,000	100,000		
Interest in fishing partnership:						250,000
J Smith & Sons	110,000	90,000	25,000	15,000		
Town property	70,000	70,000			50,000	
Back block			20,000			
Public Company Shares	10,000				3,000	
Savings & deposit accounts		30,000	5,000	2,000		
Life assurance policies	8,000	5,000				
Superannuation	50,000	35,000				
Beneficiary loans – Family Trust				5,000	33,000	
Totals (\$1,886,000)	648,000	630,000	150,000	122,000	86,000	250,000
Less Liabilities						
Term loan – Bank						80,000
Income tax	10,000	6,300	4,600	3,900		
Beneficiary loans						38,000
Advance – farm partnership						100,000
Mortgage					30,000	
Totals – net assets (\$1,613,200)	638,000	623,700	145,400	118,100	56,000	32,000

3.3 Fishing Business Transfers by Death - The Will

The Will is an all-important part of a fisherman's affairs yet sometimes no Will has been prepared or, more often, not reviewed, although family circumstances and the fisherman's asset holdings have significantly changed. It is vital that a fisherman's Will be up-to-date, to cover unexpected death.

Q How should a fisherman go about preparing, changing or reviewing their Will?

A Discussions with professionals are important. Any person can draw up a Will or a piece of paper but this often proves inadequate when reviewed after death. One would definitely not advise this course of action.

A solicitor should prepare the Will but the initial discussions and instructions may come from the family accountant or fishing consultant, who has a good knowledge of the family and individual asset holdings.

Q What happens if a fisherman dies without a Will?

A The person dies intestate and their assets are distributed between family members under a percentage formula, as set out under State legislation. For example in W.A. in the case of a spouse with children the spouse receives the first \$50,000 and one third of the balance and the children two thirds of the balance.

A family member has to make an application to the Court for administration of the estate. If minors (children under 18) are involved, a financial guarantee has to be given to ensure that they receive their rightful share of the estate on attaining the age of 18 years.

Q Is it essential that every fisherman should have a Will?

A Yes, whatever the age, if a person has an interest in fishing business assets (it may not be ownership of property, but as a member of a fishing partnership or as a family trust beneficiary) then that person should have a Will. Therefore, any young single adult child who has a loan account in the family trust needs to have a Will.

Q How often should a fisherman's Will be reviewed?

A It depends on the circumstances. The Wills of a married couple with a young family may be suitable for say five to ten years. However, once the children start choosing different career paths the Wills should be reviewed constantly, possibly every three years.

The death of a family member, divorce or remarriage are obvious times for Will review. A significant change in asset ownership (such as purchasing or selling/transferring property) can also be a reason to review and change one's Will.

Q Are fishermen conscientious in reviewing their Wills?

A Generally no. The feeling of immortality is common to all groups, including fishermen. As a result, there are sometimes disastrous consequences for the family fishing business with an unexpected death and a poorly drafted Will.

At worst, this can result in the sale of the family fishing business and at best, the fishing business is kept within the family but with a lot of ill feeling between family members as a result of the Will bequests.

Q Is it difficult to determine the details of a Will for a fisherman?

A Yes, especially if the children are growing up and choosing different career paths. The age-old dilemma for fishermen in this situation is the reality that they cannot treat their children equally if they want the family fishing business to continue after their death.

A fishing child/children must get a bigger 'slice of the asset cake' compared to the non-fishing child/children. In these circumstances, all the fisherman can do in the Will is to try to strike a degree of fairness, as against equality, in asset distribution to children. If equality is chosen, in most cases it will lead to the sale of the family fishing business because the fishing child/children will not be able to raise the finance to buy out the

fishing assets left to non-fishing brothers and sisters.

Q What steps should be taken to overcome the dilemma of how to distribute the family assets between the children?

A The answer is communication. If the children are adults, the parents should discuss the Will details with them. This not only allows differing viewpoints to be put forward but also lessens the chances of the Will being contested after death. The family discussions may become 'heated' and the use of a professional facilitator is recommended to bring rationality and reason to the family meeting.

The Will can be, and often is, an emotional issue and family friction can surface during discussions. However, this is better aired at this time rather than being left to fester and cause even greater family friction after a death.

Q Can a fishermen's Will be contested?

A Yes, more and more cases are coming before the Courts, with a relatively high success rate for the claimants. Also, although possibly an unsuccessful claim, the legal costs of the claimant(s) may be paid from the estate, if determined by the Court.

The unequal distribution of fishing business assets between children of fishermen (as discussed above) is therefore of concern, especially if there is a background of friction amongst family members.

Q What can the fisherman do, knowing the Will could be contested after his/her death?

A A recommended solution would be the gifting of fishing business assets, especially the fishing license. However, it should be noted that in some States any gifts made within a three-year period prior to the death of the donor might be included in their estate. The gifting can be direct to fishing children or an option is to gift the assets to a family trust.

The benefactor can still control this trust and only upon their death does this control pass to another fishing family member. However, with this option there may be a stamp duty cost.

Q Who should a fisherman choose as the Executor(s) of their Will?

A This depends on the circumstances but usually a competent family member (or members) is a good choice.

On death, the Executor(s) is responsible for obtaining a Grant of Probate for the Estate from the Court. This document gives the power to the executor(s) to distribute estate assets to beneficiaries. Distribution of assets however should be delayed to allow for possible contesting of the Will.

In most cases a family executor(s) would enlist professional assistance to deal with the probate application and distribution of assets.

If there is not a suitable family member for the executor position, or nominating a family member may cause family friction, a friend, accountant or a solicitor or a combination thereof, may be a wise choice. An alternative is a trustee company acting in the role.

Note that a trustee company can charge a percentage of the gross value of the estate, while accountants and solicitors normally charge fees for time spent on dealing with an estate.

Q In regard to a Will, what is a "Testamentary Trust"?

A The term "Testamentary Trust" refers to a trust to be established through a Will, covering specific assets (e.g. saving monies, residence etc) and being for a defined period (e.g. ten years from date of death). Upon the death of the Will maker, the trust commences.

Popularly the term refers to a tax effective trust, established through a Will that is specifically covered by a section of the Income Tax Act. This section allows distributions of income from an estate established trust to "minor" (under 18 years old) beneficiaries at concessional tax rates.

The tax savings through such a Testamentary Trust can be significant, for example, up to \$35,000 per child over a 15-year period and should be considered.

Testamentary Trusts can also be useful in protecting family wealth from loss or dissipation in estate distributions to adult children beneficiaries who may have:

- Financial difficulties, being close to, or in bankruptcy;
- Marriage problems, with the likelihood of a forthcoming property settlement;
- Intellectual handicap and be unable to manage their financial affairs; or
- Gambling, alcohol or drug addition problems.

The asset bequest to such a child is held in trust for a defined period (e.g. until bankruptcy is finalised) and then transferred, with any income generation during the trust period being distributed, at the discretion of the trustee, to the beneficiary.

3.4 Retirement Planning for Fishermen

Retirement is difficult for fishermen and yet it has to happen - holding on to fishing business control and fishing assets for life is unfair on the younger fishing generation. Decisions have to be made as to when to retire and how retirement is to be funded.

Q When should a fisherman retire?

A It is a well known fact that fishermen, with their love of the ocean and fishing, often do not view retirement with relish. However, pressure from the younger generation to take over the family fishing business is often a factor in "forced" retirement.

The best solution is often an "official" retirement (passing over control of some or all fishing business assets to the younger generation) but with the older generation continuing to live and work on the ocean.

The scenario of the older generation keeping control of the fishing business operations and assets until death usually causes great frustration in the younger generation and is not a recommended course of action.

Q What are the retirement concerns of the older generation of fishermen?

A Apart from the personal implications of leaving the ocean, there is a major concern about lifetime financial security. Continuing to control the fishing business and own fishing assets is a means of having this security.

The solution is to ensure lifetime financial security by means other than fishing business ownership/control. If the fisherman has significant non-fishing assets such as residential property, shares, investments, superannuation etc. there is no need to depend on the fishing business for security. This however is usually not the case, so if the fishing business is to be transferred there has to be a financial arrangement with the younger fishing generation to give the retiring fisherman the necessary security.

Q What types of financial arrangements can be entered into?

A There are three arrangements that should be considered.

(a) Fishing Lease

The older generation lease their fishing property to the younger generation on a long term (ten years or more) basis at an agreed rental which may not be the market figure, but an amount sufficient to give reasonable income. This gives a strong sense of security to the older generation because there is an annual income and the fishing business is still held by them. Understandably, however, the younger generation would have reservations about a lease. Because they still do not own the fishing business, there must be a degree of uncertainty about their long term fishing future.

(b) Acknowledgement of Debt (or Loan Agreement)

This is a simple arrangement whereby on transfer of the fishing business property, the younger generation acknowledges that they owe the retirement parents a significant sum. This sum is either free of interest or an agreed rate is decided. Every year there is an annual payment to the parents, be it principal or interest or a combination of the two. The debt repayment period should cover the life expectancies of the parents.

Conditions can be included in the debt agreement (a legal document). For example:

- Outstanding debt is forgiven on the death of the surviving parent, so it is not included as an asset to be dealt with by a Will:

- If the fishing business is sold by the borrower (i.e. younger generation) the outstanding debt amount becomes payable in full; and
- A provision whereby the lenders (the retirees) can draw in one year an increased sum over the normal annual payment (to finance a vehicle purchase, holiday etc).

An Acknowledgement of Debt does attract Stamp Duty (e.g. in WA a \$300,000 debt would attract Stamp Duty amounting to almost \$1,200).

(c) Mortgage

This is virtually the same as an Acknowledgement of Debt in terms and conditions but with added security for the retirees by having a charge on the fishing business property (either as a first or second mortgage). The same Stamp Duty rates would also apply.

It should be noted however, that with this solution, the mortgage can inhibit the capacity of the younger generation to borrow from a bank or other lending institution.

Q It would appear that retirement planning for fishermen requires considerable thought and discussion?

A Yes and it should start in some cases at least ten years prior to the actual retirement date.

Investing in non-fishing assets such as superannuation or residential property is a worthwhile initial long-term strategy if fishing funds permit, as this makes fishing retirement financially easier and not dependent upon the fortunes of the successor fishermen.

If funds do not permit this course of action then a decision concerning the need for retirement income from the fishing business or the Government via an age pension is a major and, in many cases, difficult decision for the retiring fisherman to make.

3.5 The use of a Family Trust in Fishing Business Succession Planning

The family trust is a useful entity in fishing business succession planning, because of numerous advantages. However it can be a difficult entity to understand.

Q What is a family trust?

A A family trust is an entity (established per a legal document called a Deed of Trust or Settlement) whereby a trustee holds assets in trust for nominated beneficiaries, being the members of a family and their descendants, for a period of up to eighty years. The trust would not normally last for the 80 years but would be wound up (vested) prior to this period.

The term 'in trust' means that the trust assets are not owned by any one family member but are held "in limbo" until the trust is wound up, whereupon they become the property of the nominated beneficiaries.

Q What is the role of a trustee in a family trust?

A The trustee, be it a family member(s) or a company (controlled by family members) is responsible for the operations of the trust and the maintenance of trust assets. Further, the trustee has discretionary powers to:

- Distribute annual trust income to any one or more trust beneficiaries; and
- Transfer (by vesting) trust assets to anyone or more trust beneficiaries.

However normally, as per the Trust Deed, these discretionary distributions/transfers can only be done with the approval of the Guardian.

Q Who has controlling power in a family trust?

A The 'real' power or control is held by the Appointor and in some cases the Guardian of the trust.

Q What is the Appointor?

A The Appointor is a person or persons named in the Trust Deed who has the power at any stage to appoint or dismiss a Trustee. If an Appointor dies, a replacement is nominated in the Trust Deed - often it will be the spouse or a child or sometimes the legal personal representative (executor) of the deceased.

The Appointor is undoubtedly a 'key' person in the control of a trust and its assets and is usually the senior farm family member.

Care should also be taken to ensure the succession of Appointor in the case of loss of legal capacity.

Q What is the Guardian?

A The Guardian is a person or persons named in the Trust Deed who, as per various clauses of the Deed, may have to approve 'discretionary' distributions of trust income and assets to beneficiaries by the Trustee. In other words, the Guardian can have the power of veto over these Trustee decisions, thus giving this person considerable power in trust affairs. The Guardian is usually the same senior farm member as the Appointor.

Q Why is there a need for a Guardian in a family trust?

A If there is no Guardian the trustee may lose discretionary powers as Guardian approval cannot be given. In this situation, all trust income and asset distributions must transfer to the Primary Beneficiaries of the trust as against General or Secondary Beneficiaries (as

per the Deed). Therefore if the Guardian dies or lose legal capacity and there is no nominated replacement, the Trust Deed acts like a de facto Will.

Q. Do all family Trust Deeds cover the position of Guardian and if not, what happens with a family trust when there is no Guardian?

A Some Deeds do not have a Guardian included. In these situations, the Trustee holds discretionary powers for the lifetime of the Trust.

Q Is it important to review the Guardian and Appointor positions in a family trust?

A Certainly, especially if family circumstances change. Normally these changes would happen over time, with one generation retiring from farm involvement and another taking over, but they could also be as a result of death, divorce, a career change or some other unexpected development.

With changing circumstances a Trust "Deed of Variation" should be prepared and the Appointor and Guardian as nominated in the Trust Deed changed to fit in with family succession planning.

Q Should the Deed of Trust be reviewed in regard to other details and how is this done?

A As with the Appointor and Guardian positions, other details of the Deed of Trust should be reviewed from time to time and if desired amended (providing amendments permitted per the Deed) by a Deed of Variation. Common situations covered by a Deed of Variation.

- The removal of named family beneficiary/ies due to death, divorce, change in family circumstances etc.
- The inclusion of further trust beneficiaries;
- Changing trust name;
- Amending vesting (winding up) date; and
- Updating for changes to income tax laws.

It is important to note that Trust Deed changes can have stamp duty and capital gains tax implications.

Q Is there a benefit in using a family trust in planning for the future of the fishing business?

A Yes, as in any planning, looking into the future is difficult. The expected may not happen - there may be a premature death, a divorce or a change in the career path of a family member. The ownership of fishing property/assets by a family trust allows the flexibility to cover these situations.

Q In which circumstances would the use of a family trust be beneficial?

A In the following circumstances:

- (a) A fishing business owning father/mother may wish to transfer the fishing property to fishing children, however, there is a concern that one of their children - perhaps an unmarried 25 year old - may leave the business. Having the fishing business in a trust name overcomes that problem, because if the child leaves the fishing business a relatively simple change to the Trust Deed is the solution. The alternative of having the fishing property partly in the names of individual children obviously creates problems on their departure from the fishing business especially if it is acrimonious and there would also be costs involved, legal expenses, payment arrangements and possibly capital gains tax and stamp duty.
- (b) The older generation fisherman worries about the possibility of a fishing child's marriage ending in divorce, thus impacting on the family fishing business. At the same time the fisherman wishes to transfer the fishing business property to this child. A trust, with some thought given to the controlling positions per the Trust Deed, (the fishing son/daughter who could be in a divorce situation not holding any positions of power), could be the answer. Fishing Business ownership is in the trust name and the asset can have some degree of protection from a family law settlement.
- (c) There is often limited benefit in transferring fishing business from 65 - 75 year old fishermen to the next generation of 40 - 50 year old fishermen. It is far better that the fishing business be transferred to a family trust controlled by the 40 - 50 year old generation, but with the eventual benefit going to the next fishing generation (the 15 - 25 year olds) through trust ownership.
- (d) If a Will is likely to be contested, gifting of an asset to a trust controlled by the Donor overcomes this concern.
- (e) A Family trust can be named as a beneficiary of fishing business per a Will. This can be an attractive compromise solution in the case of, say, the 40-year-old fisherman who does not wish to bequeath the fishing business directly to their teenage children, because of their age. The trust is set up for the eventual benefit of the children but control (through trust positions) and therefore discretionary powers are held, for a nominated period of time, by the surviving spouse.
- (f) A trust can be a very useful entity for income tax planning. Fishing income can be distributed to a range of trust beneficiaries, thus minimising the overall fishing tax liability. However, it should be noted that these income distributions build up loan accounts, within the trust, owing to the beneficiaries. These loan debts could become of concern to the Trustee if the beneficiary (or executor of his or her estate) demands payment of the past distributions. They are also subject to stamp duty when trust assets are vested.
- (g) A trust can be a useful entity in Capital Gains Tax planning. As a trust can have a 'lifetime' of 80 years, once a fishing business *is* held by a family trust, it is

possible to cover several generations of family fishermen without a transfer of ownership taking place. The only requirement is a transfer of trust control positions from one generation to the next. Thus, for the time the fishing business is held by the trust there is no exposure to a potential capital gains tax liability.

Direct ownership of fishing business does not have this advantage and in the event of rising fishing license values, capital gains tax can be a real financial concern when it comes to succession planning.

With all decisions relating to the ownership of fishing business assets there are "horses for courses" and each decision needs careful consideration by all family members.

3.6 Non-Fishing Business Assets, Superannuation and Life Assurance

Providing funds permit, investing in non-fishing assets is an attractive way to assist in providing for the financial requirements of the retiring fisherman.

Q Does having non-fishing assets such as residential property, public company shares/units, savings and deposit accounts help in fishing business succession planning?

A Yes, in a number of ways. Non-fishing assets:

- Assist in giving financial security to the retiring fishing generation:
- Lessen the draw on fishing business funds in providing an income to the retiring family members:
- Make it easier to draft Wills, as there are non-fishing assets to leave to non-fishing children; and
- Diminish the older generation's financial dependence on the fishing business, especially when the fishing business financial position is "tight" (e.g. after a poor catch year).

Q **Should there be a plan to build up non-fishing business assets?**

A Providing funds permit, then non-fishing assets should be built up. In the overall long term family financial plan, provision should be made to invest a proportion of surplus fishing funds in non-fishing assets, rather than always investing in the fishing business through purchasing new plant or acquiring additional pot licenses.

Q **Are there any particular non-fishing assets that it is preferable to invest in?**

A It depends on the circumstances. Residential property is often favoured because:

- Generally it is an appreciating (in value) asset;

- It can be regarded as a potential retirement home (or sold to provide the funds for a retirement home);
- A city property can be a home for children that are living away from home, for example those studying at tertiary institutions; and
- There can be taxation advantages through negative gearing (the property must be rented to obtain these advantages).

Q What about investing in superannuation?

A Fishermen with surplus funds should consider superannuation as an option in planning for retirement. Although Government regulations have made the administration and management of superannuation increasingly complex, the ease of making superannuation contributions and the tax deductibility of these contributions are attractive features.

Q What about "self-managed" superannuation funds?

A Under the Superannuation Industry (Superannuation) Act 1993 (the SIS Act) there is recognition of small funds (termed "excluded funds") with under five members. These types of funds have significantly less statutory requirements than larger funds and have the advantage that members (e.g. fishermen and family) can be involved in fund management, as the Trustees and can direct where their fund contributions are invested. In addition, self-managed funds can assist in succession planning in that fund asset control, through the Trustee, can transfer from one generation to the next.

Q What about Life Insurance in planning?

A In most farming families there is a need to consider having life insurance cover. Generally investing in traditional type policies (Whole of Life and Endowment) has lost favour with the farming community for a variety of reasons. There are many of these traditional policies still held by "older generation" farmers and they should be reviewed, with thought given to either surrender (cashing out), converting them to paid up policies (no payment of further premiums), or replacing with alternative policies.

There is a place for life insurance in fishing business succession planning, in covering premature death or disability of a family member. All fishermen, with the assistance of a professional insurance adviser, should consider term assurance as part of their overall cover.

Q What is term insurance?

A A term insurance is a policy that has death cover only with no investment component. For the younger fisherman with a family, a policy (with relatively inexpensive premiums) can give a great deal of comfort by ensuring significant cash funds will be available in the case of unexpected death to cover matters such as fishing business debt reduction, the possible purchase of a non-fishing business residence for spouse, future education expenses for children etc.

3.7 Fishermen Divorce

Divorce can have a significant impact on the family fishing business, possibly leading to the sale of all or part of the business. The courts have ruled that no concessions can be given in a property settlement to allow for the continuance of the family fishing business.

Q How does the Family Court determine a property settlement?

A The decision is based on contributions made by each party and the needs of the parties involved.

Q What matters are taken into account when deciding upon contributions made in a property settlement?

A The following matters would be taken into account by the courts regarding contributions:

- Any financial contribution made directly or indirectly to the marriage (e.g. fishing business inherited/owned prior to marriage);
- Any non-financial contribution made directly or indirectly to the marriage (e.g. assisting in fishing business operations);
- Any contribution made by a party to the marriage for the welfare of the family including that of the home maker or parent; and
- The effect of any proposed order upon the earning capacity of either party.

Q On what basis are the needs of the parties taken into account in determining a property settlement?

A The courts would take into account the following factors:

- The age and state of health of the parties;
- The income, property and financial resources of each party and the physical and mental capacity of each of them for gaining employment;
- Whether the party has care or control of a child of the marriage who has not yet attained the age of 18.

Q Can you transfer assets to avoid a property settlement via the Family Law Court?

A Any transfer of property in anticipation of avoiding a property settlement via the Family Law Court will be overturned by the Courts. However, if assets have been transferred for reasons other than the intention to avoid a property settlement under the Family Law Act then those transfers would not be brought to account in the property settlement.

Q Would a pre-nuptial agreement safeguard the family fishing business?

A The Federal Government has imposed legislation which will allow prenuptial agreements to be legally enforceable in the future. The agreement could enable you to 'quarantine' certain assets from a divorce property settlement. Although the Courts could overrule such a prenuptial agreement if not handled correctly in its formation. However in the context of fishing business succession planning these changes give some hope that the family fishing business may possibly be protected by "quarantine" in an agreement. Good legal advice should always be sought.

4 Good and Services Tax ('GST')

The general GST rules apply in the same way to fishing or primary production businesses as they do to all other enterprises. The general rules are that GST will be payable where there is a taxable supply.

For a taxable supply to arise:

- there must be a supply;
- the supply must be made for consideration (or deemed consideration);
- the supplier must be registered or required to be registered;
- the supply must have the necessary connection with Australia; and
- the supply must not be 'GST-free' or 'input-taxed'.

In the context of intergenerational transfers to family fishing businesses the sale of a Business as a 'going concern' will potentially apply under the GST regime:

4.1 Sale of business as a 'Going Concern'

This concession provides that the sale of a business will be GST-free if it constitutes the supply of a going concern. The following criteria must be satisfied:

- the supply must be for consideration;
- the recipient/purchaser must be registered or required to be registered;
- the parties to the transaction must have agreed in writing that the supply is of a going concern;
- the vendor must supply to the purchaser all of the things that are necessary for the continued operation of the enterprise; and

- the vendor must carry on the enterprise until the day of the supply.

The Commissioner adopts a reasonably strict view of when all of the assets necessary for the continued operation of an enterprise will be transferred.

In the context of the transfer of a fishing business, the Commissioner's view with regard to the going concern concession would only apply where the transfer effected the transfer of the necessary fishing license, all necessary plant and equipment, and any other relevant intangible assets.

Care needs to be taken where, for example, the fishing license is transferred to, say, a trust and the fishing business is transferred to the son or daughter. In those circumstances the Commissioner adopts the view that, so long as a lease of the pots to the son is entered into before the business is sold to the trust, then both transfers (ie. license and business) will qualify for the going concern concession.

5 Capital Gains Tax Concessions

There are a number of potentially significant CGT concessions that were introduced with effect from September 1999. These concessions are known as the 'Small Business CGT Concessions'. From that date a general CGT 50% discount was introduced for all taxpayers other than companies.

In addition to those concessions there is also a possibility (particularly where a fishing business has been owned in the family for a number of years) that some fishing businesses will be pre-CGT and will escape the CGT net altogether.

Assuming that the fishing business is acquired post-CGT then the availability of the CGT discount and concessions may in appropriate cases enable the fishing business to be transferred in a CGT efficient manner.

5.1 Overview

The general outline of the CGT Concessions is as follows:

- a. the concessions apply where the transferor (together with its prescribed associates) has:
 - net assets of less than \$ 6 million as at the transfer date; or
 - satisfies the small business entity test whereby turnover is less than \$2 million.
- b. in addition to the general 50% discount available for assets owned for more than 12 months before their transfer, the CGT concessions that are available include additional tax discounts by way of:
 - i. an exemption from CGT, upon the sale of a business operated for at least 15 years

where the transferor is retiring;

- ii. a 50% active asset reduction;
- iii. a replacement asset rollover; and
- iv. a retirement exemption that provides in effect a lifetime shelter of up to \$500,000 for each individual.

5.2 2007-2008 Changes

Changes applicable to the 2007-08 and later income years eligibility thresholds make it easier to access a range of existing concessions for small business entities. The changes to the basic eligibility conditions include:

- a turnover test as an alternative to the maximum net asset value test, and
- an increase to the maximum net asset value threshold to \$6 million.

5.3 Changes to the Basic Eligibility Conditions

A small business must satisfy several basic conditions to be eligible for the capital gains tax concessions. There have been changes to the following basic conditions.

5.3.1 A Turnover Test

A turnover test can be used instead of the maximum net asset value test. A business will pass the turnover test if it has aggregated turnover less than \$2 million. The existing CGT grouping rules have been modified and are now called aggregation rules. The aggregation rules apply in working out aggregated turnover. Additional eligibility conditions (apart from the \$6 million maximum net asset value test) that apply to the concessions must still be satisfied for any particular concession.

The partners in a partnership are also eligible for the small business CGT concessions if:

- the partnership carries on a business;
- a CGT event happens to a CGT asset of the partnership;
- the partnership has less than \$2 million aggregated turnover; and
- the other basic conditions (apart from the \$6 million maximum net asset value test) are satisfied.

Note that the turnover test must be satisfied by the partnership (not the individual partner) for the partner to meet this basic eligibility condition.

5.3.2 Threshold Increase for the Maximum Net Asset Value Test

The limit of the Maximum Net Asset Value Test has been increased to \$6 million. A business with a turnover of \$2 million or more may still be eligible for the CGT concessions if they satisfy

the maximum net asset value test. Any additional conditions that apply to the concessions must still be satisfied.

Entities that do not carry on a business will continue to be eligible for the CGT concessions if the asset is used or held ready for use in a business or is an intangible asset that is inherently connected with the business, of a spouse or child under 18 years, affiliate or connected entity, and:

- the entity that owns the asset meets the \$6 million maximum net asset value test, and
- the asset passes the active asset test.

5.4 Active Asset Concession

Careful consideration needs to be given to inter-generational fishing business transfers with respect to whether the active asset concession is available. This will be straightforward in cases where the fishing business and the fishing license are owned by the same persons.

However, complications can arise where the fishing business is owned say by a trust and the fishing business is carried on by a partnership. Often, there is no rent charged (or, if rent is charged, it tends to be considerably less than market value rental).

The Trust in that circumstance is not carrying on a business in its own right. The fishing business can only therefore qualify for the 50% active asset concession where the fishing business is held for use in the carrying on of a business by either:

- a 'small business CGT affiliate' of the fishing business owner; or
- another person or entity that is connected with the fishing business owner.

In this context an entity is connected with the fishing business owner if either party controls the other or both are controlled by the same third party.

Care must be taken to ensure that these tests are considered in detail having regard to the specifics of each case.

5.5 Controlling Individuals

There are a number of circumstances in which an entity must be able to establish that it has a 'controlling individual' so it can qualify for some components of the small business CGT concessions.

The most common of those circumstances include:

- where the asset being sold is an interest in a company or trust;
- where the 15 year retirement concession is being applied; or
- where the \$500,000 retirement concession is being applied.

Discretionary trusts will be deemed to have a controlling individual in the year of disposal if at least 50% of the income and capital distributions effected by that trust during the relevant year are made to a natural person.

6 Partnership Reconstructions

One of the ways that a fishing business family can effect the transfer of a fishing property is to do so in a 'staged' manner. For example, it may be thought to be desirable to introduce children as partners in the operating fishing partnership before giving them an interest in the fishing business.

6.1 Concessional Tax Rules

This is a common scenario and fortunately there are some concessional rules that can be utilised to ensure that tax efficiencies are maintained throughout such a restructure process.

In particular, there are provisions that allow assets comprising stock or depreciable plant to be transferred into a new partnership at their tax book value (rather than market value at the time of transfer) where there is the required degree of continuity of ownership between the new partnership and the previous owner.

In the case where trading stock is transferred, the relevant provisions require a 25% continuity of ownership to be maintained. In the case of depreciable plant, the new rules simply require some continuity of ownership to be maintained, but no percentage is specified.

6.2 Staged Transfer via Interim Partnership

The existence of the trading stock and the plant rollover rules allow stock and plant to be rolled from an existing partnership comprising, say, mum and dad to a son by the use of a interposed or interim partnership structure. For example, if the existing partnership is 50:50 between Mum and Dad the first step is to transfer the plant and stock of that partnership to an interim partnership comprising say Mum 25%; Dad 50%; and Son 25%. Subsequently a final transfer can be effected of the remaining 75% of the assets to the Son (or a new partnership of the son and his wife).

In each stage of the transfer the 25% continuity test is met and there will be no tax implication of the Stock or plant transfers. The question often arises to the timing of such a restructure, particularly where an interim or interposed partnership is adopted. While there is no specified period of time, to avoid any argument the Commissioner may seek to put that Part IVA anti-avoidance tax provisions may apply, the interim partnership should trade for a reasonable period. In most cases a minimum of a calendar quarter is appropriate. That quarter can also tie in with BAS reporting dates to minimise the doubling up of any compliance costs.

7 Farm Management Deposits

Farm management deposits are a tool that are used primarily to assist in the "averaging" of tax payable for those engaged in primary production activities (including individuals who receive a distribution of primary production income via a trust).

Eligible individual taxpayers are entitled to 100% tax deduction for any sum deposited in an approved Farm Management Deposit in the year in which that deposit is made.

The requirements for Farm Management Deposits to be tax effective are that:

- funds must remain invested for a period of 12 months to qualify for the deduction ;
- individuals are eligible for deductions on account of FMD's only where they have no more than \$65,000 non-primary production income in the relevant year.

After the 12 month minimum has expired the Farm Management Deposit can be withdrawn (in whole or in instalments of \$1,000) and it will be assessable in the year in which it is redeemed.

Individuals are able to accumulate up to \$400,000 in Farm Management Deposits at any one time.

As is self-evident, the primary purpose of a FMD arrangement is to assist in the averaging of taxable income. They are particularly useful where farm properties are subject to significant fluctuations from one year to the next. In those cases, it is possible to pay excess cash derived from farming activities in one year into a FMD to reduce tax payable for that year, with a view to redeeming the investment in a subsequent year where taxable income is lowered because of a drought etc. Note that some care needs to be exercised in considering the year in which the funds are redeemed because of the existing of the general primary production averaging relief. This has the effect of averaging income in a poor year in any event and care must be taken to ensure that the true tax effect of a redemption is assessed.

In the context of inter-generational planning there are opportunities to use farm management deposits in the name of mum and dad in the last few years of their operation of the farming enterprise and for redemptions of those FMDs to take place in the year immediately after mum and dad have ceased farming activities, thereby accelerating the averaging advantage that is obtained. Alternatively FMDs can be subsequently redeemed to fund superannuation contributions progressively in order to stay below the contributions caps.

If you die during the income year the deposits must be repaid. The deposits are considered to have been repaid in the income year when the death occurs. They are considered assessable income (to the extent they were previously allowed as a deduction) in the individual's income tax return up to the date of death; not the estate return.

If the deposits are repaid within 12 months because of death, the deposits will still be considered to be farm management deposits but there will only be an income tax deduction if the death occurs after the income year in which the deposits are made.

8 Handover Before Death – Practical Issues

8.1 Introduction

Whilst we refer frequently to the “Family Fishing business” and it is undoubtedly the case that most fishing enterprises are conducted within family structures. Recognising the diversity of family relationships will offer some insight into the vast range of issues, challenges and potential solutions confronting fishing families as they began to work through the decision-making process and subsequent implementation phase associated with inter-generated transfers of Fishing business.

8.2 Motivating Factors

The reasons that fisherman choose to hand over fishing assets during their lifetime are as varied as the families themselves. However, most transactions involving inter-generational transfers of fishing assets will take into account some combination of the following:

- The diminished physical and mental capacity of the Transferor to continue to work on the ocean into old age.
- The desire of the Transferor to enjoy "retirement" without the burden of the fishing business.
- Recognition of the Transferee's historical contribution to the success of the fishing business through years of hard work at often below-award remuneration.
- The Transferee's ambition to have greater control over long-term business planning strategies.
- Offering greater certainty of financial outcomes for all family members upon the death of the Transferor.
- Securing the family fishing business for lineal descendants (regardless of possible subsequent re-marriage of Transferor).

8.3 Methods

The methods that may be used to implement such a transfer cannot be exhaustively listed. Some of the issues that must be considered when planning such a transaction include:

8.3.1 Existing Structures

The Transferor's ownership structure may lend itself to particular advantages. For instance, assets held within a discretionary trust of which the Transferee is a beneficiary may be retained, with merely a handover of control of the structure itself.

8.3.2 Partnerships

Where the Transferor and the Transferee conduct business activities in partnership, there are a range of possible dealings between them that can be used to efficiently shift assets to the Transferee.

8.3.3 Timing

An instantaneous transfer of the enterprise may require different strategies to those adopted for a gradual shifting of assets over a period of time.

8.3.4 Strings Attached

Philosophical issues of "ultimate control" need to be addressed to determine what "strings" the Transferor may wish to leave in place to protect (or control) the Transferee post-transfer.

8.3.5 Cost

Some solutions can be expensive to set up. The more security that the Transferor retains, the more likely it will be that costs will be incurred (eg mortgage preparation costs and stamp duty).

8.3.6 Family Politics

The involvement of all family members in the planning phase (including other children of the Transferor and their spouses) can help to reduce the risk of subsequent disputes arising. But it can also "muddy the waters" considerably.

Some of the tools that can be applied in various combinations include:

- Gift of assets
- Sale of assets
- Loans
- Mortgages/Charges
- Lease (Land/Plant and Equipment)
- Insurance
- Superannuation
- Wills

The permutations are virtually endless.

8.4 Retirement Income

In the ideal scenario, the Transferor will have sufficient off-fishing assets to independently fund their retirement. In reality, that seldom happens.

Care must be taken to balance the legitimate financial expectations of the retiring Transferor against the capacity of the Transferee to fund both the retirement of the Transferor, as well as the ongoing cost of operating the business. Too much residual debt can render the Transferee's business financially unviable.

Security is also a factor that requires balance. The Transferor may reasonably expect security to be offered to guarantee an agreed income stream for retirement. That needs to be balanced against the costs of establishing such security (mortgage costs and duty) and the commercial lending requirements of the Transferee's third party financiers (banks).

8.5 Control

It is not uncommon for a Transferor to want to maintain some ongoing involvement in the business and even continuing control. This can result in the Transferor offering a positive 'guiding hand', but it can also be an unworkable management structure. Some reasons for a Transferor maintaining this direct link to the Transferee's business include:

- Securing the Transferor's retirement income;
- Securing the inheritance of the Transferor's other beneficiaries upon death;
- Managing the activities of inexperienced or potentially reckless Transferees;
- Guarding against matrimonial claims upon the breakdown of the Transferee's marriage; and
- Avoiding the family fishing business passing to the spouse of the Transferee (upon the Transferee's death) and being exposed to subsequent re-marriage.

As in all aspect of planning and advising on these matters, balance must be achieved.

9 Transfer Upon Death

9.1 Introduction

Any genuine attempt to plan for inter-generational transfer of assets must include a comprehensive review of the Wills of all affected family members (including spouses).

The Will presents the final opportunity to make a distribution of assets in a manner that achieves the Transferor's ultimate intentions. There are two separate concepts that must always be considered in making distributions of assets to beneficiaries.

- Fairness; and
- Equality

It is not necessarily always fair to treat children exactly equally. Indeed, it is often impossible to achieve genuine equality. Different beneficiaries may acquire different classes of assets (plant and equipment, cash, investment property, shares etc) at different times (during the Transferor's lifetime or upon death).

However, care must be taken to ensure that unequal distributions do not unfairly deprive potential beneficiaries of a legitimate expectation to an entitlement. Such an outcome will necessarily lead to acrimony and potential disputes.

9.2 Testamentary Trusts

Such a structure within a Transferor's Will offers to the Transferee obvious flexibility, some asset protection and potentially advantageous taxation treatment for possible infant beneficiaries. As such, they lend themselves extremely well to fishing families.

It is not the purpose of this presentation to explore the various issues arising out of the implementation of testamentary trusts. That can be left for another day.

9.3 Inheritance Claims

The *Inheritance (Family Provision) Act* offers an avenue for certain family members of a Transferor (spouse and children, especially) to challenge the adequacy of provisions made in a Will. When advising clients in relation to this issue, several factors must be considered

9.3.1 Fairness

As mentioned earlier, it is important to maintain a perspective that is designed to achieve an overall 'fair' result.

9.3.2 Respective Needs

The Courts will have regard to the respective financial circumstances and likely needs of the various family members.

9.3.3 Inter Vivos Dispositions

The Court cannot easily undo a valid commercial dealing undertaken during the Transferor's lifetime. A claim under the Act will take into account only the actual financial circumstances of the Transferor as at the date of death.

9.4 Uncertainty of Beneficiaries

A lack of planning can often lead to disastrous consequences. Unexpected events resulting in serious injury and even death can occur – especially in a physically demanding enterprise such as fishing. Without a carefully considered succession plan in place, the business may flounder. A lack of planning and lack of consultation can induce uncertainty and even suspicion. That is fertile ground for lawyers!

By involving all family members in the development of a broadly accepted succession plan, all parties can plan their financial future with certainty and confidence. Disagreements are generally best managed while the Transferor is still alive and able to manage expectations and explain decisions. In contrast, families that make no plans can leave behind unworkable arrangements with unforeseen outcomes. Additionally, possible Transferees may be unwilling to dedicate an unknown future to an uncertain outcome. Without the physical and practical support of the Transferees, the value of the business may be greatly eroded, if the Transferor is unable to properly manage the fishing business alone in old age.

10 What is Transition to Retirement?

If you are 55 and over, you now have the option of easing into retirement. You can reduce your working hours without reducing your income. You can top up your reduced income with a regular ‘income stream’ from your superannuation savings. This is now referred to as Transition to Retirement (‘TTR’).

Until recently, you could only access your superannuation once you turned 65 or retired. This meant it was difficult to reduce your hours of work and still maintain your standard of living. With this new measure, you can roll some or all of your superannuation over into a retirement income stream called a pension. Then you can top up your reduced income by drawing on your superannuation.

However, you need to be aware what impact this measure can have on you and your personal circumstances. Some parts of this measure are complex, and equally complex to set up and maintain.

From 1 July 2005 a person who has reached their preservation age will be able to access their superannuation through an income stream without having to retire permanently from the workforce.

The benefits of these changes include, but not limited to:

- Older family members and employees who want to stay connected to the workforce and their businesses can do so by removing the artificial barrier of being required to retire before be able to access superannuation benefits;
- A more flexible and adaptable retirement income system providing more options for people making the transition from work to retirement. For example, a person could continue working part-time and use part of their superannuation to supplement their income.

- Making possible both cash flow and tax effective family succession strategies to be developed and implemented without increasing the level of debt; and
- Making possible the implementation of strategies to unwind complex business structures over time without crystallizing crippling income tax, capital gains tax and stamp duty liabilities.

In designing these regulations, the Government has been careful to provide maximum flexibility for individuals while minimising complexity. That includes:

- Not imposing a work test
- Not capping the amount of benefits a person can access
- Allowing individuals to continue to make superannuation contributions notwithstanding they have commenced retirement and are drawing a pension;
- Allowing people who commence a pension to stop (or commute) their income stream and return the benefits to their super fund. This would benefit people who choose to return to full time work.
- These pensions can't be commuted and cashed out as a lump sum while a person is still working. You will need to take your superannuation benefits as regular payments. However, once a person retires or reaches age 65, they will have the option to commute the allocated pension and access their full benefits.

Your preservation age is generally the age you are allowed to access your superannuation benefits when you stop working. The table below shows your preservation age. Once you reach your preservation age, you can now access your superannuation benefits without having to retire completely from the workforce.

Date of birth	Preservation age
Before 1 July 1960	55
1 July 1960 – 30 June 1961	56
1 July 1961 – 30 June 1962	57
1 July 1962 – 30 June 1963	58
1 July 1963 – 30 June 1964	59
After 30 June 1964	60