



**The Institute of
Chartered Accountants
in Australia**

N7 - Arrangements to Cover the Incapacity or Death of a Sole Practitioner

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ARRANGEMENTS TO COVER THE INCAPACITY OR DEATH OF A SOLE PRACTITIONER

Problems have arisen where a sole practitioner has become physically or mentally incapacitated and consequently unable to continue to manage the practice, or has died without making adequate arrangements for the conduct of the practice by others. The following guidance is intended to assist sole practitioners in identifying the solutions to the problems which will inevitably arise in the event of their incapacity or death. These problems may affect the member's family, clients, other members and firms who may be involved in the continuation of the practice, and the member's personal representatives.

General Considerations

1. All members in public practice have a duty to ensure that their practices are at all times properly supervised and conducted, including implementing arrangements to cover holidays and sickness of the practitioner. The problems which will inevitably arise where a sole practitioner ceases to be able to conduct the practice, because of continuing incapacity or death, are much more serious. The interruption of services resulting, in particular, from mental incapacity or death, will cause considerable difficulty and inconvenience to the member's clients, additional anxiety for his or her family, and reduction in the value of the practice or even its disintegration.

2. It is therefore vital for a sole practitioner to confront these problems and difficulties, preferably when first commencing practice, and to make arrangements appropriate to each of the following circumstances to enable the practice to be carried on with a minimum of dislocation:
- (a) short-term absence due to holiday or sickness;
 - (b) continuing physical incapacity;
 - (c) mental incapacity;
 - (d) death.

The arrangements in respect of (b), (c) and (d) should provide, as far as possible, for the practice to continue as a going concern by an appointed 'alternate' (see below) until such time as the sole practitioner recovers or a decision is made to dispose of the practice. Where the member is supervising the practice requirements of a professional year candidate, or a student awaiting admission, these arrangements should include provision for notification of death or anticipated prolonged absence of the sole practitioner to the Institute so that provision can be made to ensure that the intending applicant's admission status is not placed in jeopardy.

3. The arrangements may be made with another sole practitioner or with a firm. According to legal advice obtained by the Institute, any effective arrangements will require specific legal measures, such as those described below. It is, however, first necessary to consider the specific legal problems associated with the provision of services in the following reserved areas of practice, if incapacity or death of a sole practitioner should occur.

Legal considerations arising in reserved areas

4. Audit

The Corporations Law allows a firm or an individual to act as an auditor of a company. In the case of a sole practitioner the individual practitioner will be appointed as auditor of a company. The individual appointee must oversee and sign off the audit. It is not permissible for another person who has not been appointed to sign an audit report.

There may be a situation where the sole practitioner has become physically (but not mentally) ill, and has completed the audit work save for the final review and signing of the audit report. In this instance an alternate who had been properly appointed by a power of attorney could, if satisfied with the audit work, carry out the review in consultation with the practitioner and sign the report on the authority of the practitioner. Temporary incapacity, mental or physical, would not necessarily terminate the appointment. In this situation the alternate (or sole practitioner where appropriate) should seek legal advice on the specific circumstances.

Where a sole practitioner who is an auditor dies or is mentally incapable, the audit appointment will be terminated and it will not be possible for an alternate to sign off an audit on their behalf.

5. Trustee in Bankruptcy/Liquidator

A sole practitioner who acts as trustee in bankruptcy, or liquidator, will be appointed in a personal capacity. In the event of incapacity or death of the appointee, a new appointee will need to be appointed. If an appointee dies, the appointment is automatically vacated. Specific procedures apply when appointing a new appointee. The procedures vary depending on the nature of the administration. An alternate or other 'substitute' is not automatically entitled to act in place of the sole practitioner. The appointment may need to be sanctioned by the Court, creditors or relevant committee. In certain circumstances it may be possible for an alternate to deal with a sole practitioner's resignation or vacation of office particularly as the representative of the sole practitioner's estate. If presented with these circumstances the alternate should seek legal advice.

6. Tax Agent

Where a sole practitioner acts as a tax agent there may be other employees in the firm who can continue to act as tax agent for clients during the period of incapacity. Where a partnership or company is registered as a tax agent, the person specified in the application for registration, as the nominee of the partnership, is registered as the nominee of the tax agent. Tax agents can register partners and employees as their nominees. Once registered, nominees may sign tax returns. It is not possible for the alternate to sign a tax return on behalf of the practitioner unless they are a registered nominee. Registered tax agents will need to notify the Tax Agents Board of any changes to nominees. If the alternate is a registered tax agent they can sign off in their own capacity.

7. Investment Business Considerations

The clients of sole practitioners who are authorised to carry on investment business may have investment commitments which the practitioner's incapacity or death could affect. Although there is no statutory requirement for these practitioners to make alternative arrangements in the event of their incapacity or death, it is advisable for them to do so.

In choosing an alternate for a practice which carries on investment business, the sole practitioner should choose an alternate who is licensed by the Australian Securities and Investments Commission ("ASIC") to carry on the investment business.

8. Arrangements Needed

The Institute has prepared a package outlining some of the issues a sole practitioner should consider in making arrangements for the continuity of their practice in the event of their future incapacity or death. It allows sole practitioners to determine for themselves, while competent, who will manage their practice and affairs in the event they are unable to do so.

The package recommends legal measures for the following arrangements:

- (i) the appointment of an alternate as an attorney under a protected power of attorney (known as an enduring power of attorney) to enable that person to act during the sole practitioner's lifetime in the event of the practitioner's physical or mental incapacity; and
- (ii) the appointment of an alternate as a special executor under the sole practitioner's will to attend to the affairs of the practice until it is sold, transferred or otherwise disposed of.

The package, *Guidance on Incapacity or Death of a Sole Practitioner*, is available on the Institute's website, charteredaccountants.com.au.