ASSET PROTECTION OVERVIEW

Whether you run a business or have personal assets. In this short White Paper, we outline some definitions and some processes to follow:

Why Consider Asset Protection?

When contemplating a property, business or other asset acquisition, asset protection must be an important consideration.

All people should adopt a plan for a worst-case scenario. Many self-employed people and those in positions of responsibility are conscious that their personal assets are highly exposed. Once there is a threat to assets, often it is too late to protect them. Protecting assets also includes determining the most appropriate structure to hold your assets.

Protecting Assets

When purchasing an asset such as a business or property it is vital to:

- ✓ Ensure that capital injections into an asset purchase, generally in the form of loans, are secured over the assets of the business venture or the property.
- ✓ Determine the most appropriate structure to hold the asset in conjunction with lawyers and accountants. Holding an asset in your own name, in the name of a partnership, trust or company are common.
- ✓ Wherever possible ensure personal and business assets are not at risk from creditors.
- ✓ Where possible avoid spouse/personal/director guarantees, which expose personal assets.
- ✓ Ensure the above measures are relevantly documented.

Quarantined Assets

Should there be a threat of legal proceedings, generally a spouse's assets won't be caught in a bankruptcy proceeding or company liquidation if:

- ✓ The spouse has not guaranteed the debts of the spouse in the business.
- ✓ The spouse’s assets have not been mortgaged to secure your debts.
- ✓ They are not a partner to a business under attack.
- ✓ The spouse’s assets were legitimately acquired by the spouse and were not transferred to the spouse to avoid creditors confiscating assets, which may be contrary to provisions of the Bankruptcy Act.

Is Insurance Enough?

Insurance is a vital ingredient of asset protection as a safeguard for circumstances where a person may suffer financial loss. However, many insurance policies may be inadequate to provide individuals exposed to trading and professional risk with adequate protection. While it's vital to seek coverage from the appropriate policy, insurance policies generally preclude cover where a person has done something outside the scope or in contravention of the insurance policy. If this is the case, you may be liable to find funds above what an insurance policy will provide, or in total if the policy is found to not apply. Seeking specialist insurance advice is important.

The Family Home - Transfer to Spouse Less at Risk

A common asset protection strategy when in a stable long-term relationship is for the partner of the person exposed to risk holding all assets in their name. This is only effective where the spouse holding the assets is not exposed to any risk themselves.

Discretionary or Family Trusts

Trusts, where property is held by a trustee for the benefit of others (i.e. beneficiary(ies)), can be effective entities to hold and protect assets, including property.

Generally, a beneficiary of a discretionary trust does not have any right to the assets of the trust until the Trustee exercises their discretion to distribute the income or capital of the trust to a beneficiary stipulated in the Trust Deed. Accordingly, the property and other assets of the trust are not usually exposed to creditors. If a trust is established for asset protection, it should not generally operate a business or engage in any other trading or risk related activity.

Capital Gains Tax ("CGT") Implications of Transferring Property or Other Assets to a Partner

Generally, this will apply, however you can ignore a capital gain or capital loss made from a CGT event relating to a dwelling that was your principal place of residence.

This can change, however, depending on how you came to own it and what you have done with it,

- If you have rented it out;
- If it has not been your primary place of residence; or

CGT applies to property and transactions that occurred after 19 September 1985. If any of the above apply to you or you have any questions relating to taxation, you should consult your accountant.

Conclusion - Aspects of asset protection and taxation must be considered when purchasing any asset such as a property or business. Further, asset protection should be reviewed regularly.

It is strongly recommended business advisers including accountants and lawyers are involved in the process, to ensure rights and obligations are respectively protected and honoured.

Onerous Directors and Trustee Duties may also be relevant depending on your preferred structure.

DISCLAIMER: This White Paper is provided as a broad overview and should not be relied upon as a substitute for legal advice.

If you require further advice in relation to the above or business generally, please contact us.

More Information?

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