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Legal Bulletin

ASSET PROTECTION

In Australia, one in every three Australians is either suing or being sued.

New South Wales is the third most litigious state in the world, behind California and Texas, with Victoria not far behind.[1]

If you are in a business then you are most likely to be sued three times in your life.[2]

The need for directors of companies to protect their assets is critical as they could be named in litigation proceedings along with their company.

The aim of asset protection is to minimise legal, business and political risks, by safeguarding assets from litigation, loss and diminution in value. The preservation of assets is achieved by structuring the ownership of assets in an effective and secure manner thus protecting the assets from potential creditors, government agencies and excessive taxation. A crucial element of this philosophy is related to wealth management and financial planning and in turn providing ongoing business and personal security.

The notion of asset protection is entrenched in capitalist economies. This notion is reflected by the well-established role of limited liability companies and family trusts. The goal of asset protection is to secure one's financial freedom, financial privacy and financial independence. However, these goals are not a 'fait accompli' as the government has given priority to the policy objectives of revenue collection and creditors rights. These rights continue to be expanded.

The reality is that we live in a culture of accountability; directors of companies are increasingly becoming subject to litigation lawsuits. Frivolous or not any lawsuit is serious and exposes you to loss. In order to protect one's assets structures, processes and mechanisms need to be put place to minimise risks and exposure to litigation.

BE PROACTIVE NOW

A key facet of asset protection is to be proactive. There are many pitfalls in being reactive. Australian Bankruptcy law prohibits a person from transferring their assets to another with the intent of defrauding a known creditor. Liquidators and trustees in bankruptcy have far reaching powers to set aside transactions. But most of these powers are subject to transactions that took place within certain time frames, it can be up to 5 years. For that reason it is important to act now so that the asset protection strategies are put in place years before a risk arises.

A further benefit in being proactive in protecting your assets is that when a litigation lawyer evaluates the prospect of suing an individual (for example director of a company), they will always look at what assets you hold. If you own nothing there is less chance of being sued.

The first step to protecting your assets is to make them invisible or more realistically not yours – whilst maintaining control over them. This is achieved by moving them out of the reach of lawyers, courts, and government agencies.

Most business have professional indemnity and other business insurances in place, however insurance may not cover all litigious claims or may only protect you to a certain figure. Over that figure it is your problem. Insurance companies are in the business of making money. It is critical that you read the fine print, are aware what you are covered for, how much you are covered for and in what circumstances your insurance company will not pay up.

YOUR BUSINESS STRUCTURE

Your business structure can also create a scenario where you can be more exposed to attack. For example as an individual or as a partner you have no protection. In a partnership, you bear unlimited liability for the actions of the other partners.

SUPERANNUATION

Superannuation is an effective form of asset protection. This is because superannuation is free from creditors where the value of the superannuation is less than $1,228,440 (indexed). Where the superannuation fund exceeds $1,228,440, the excessive portion is exposed to creditors.

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DISCRETIONARY TRUSTS

A common form of asset protection is to have your assets held in a trust. Discretionary trusts are the most effective form of trust. A Discretionary trust gives you flexibility as to income and asset distributions. Beneficiaries may include other trust, companies, individuals, family and non-family members. The main benefit of Discretionary trusts is that the assets are held by the trust, not the individual beneficiaries.

Asset protection is recommended for every business owner. The advantage is if either an employee or a client sues the director or the business, the assets are protected because they are owned by a separate entity.

Andrew Lord has expertise in asset protection and to date has been commissioned by several clients. We will happily advise anyone whom the reader knows who may need “firewalling”.

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[1] Baldock M, 720 ABC Perth, Asset Protection, 31 August 2004.
[2] ibid.

ABOUT LORD COMMERCIAL LAWYERS

Lord Commercial Lawyers is Melbourne based commercial law firm. The firm is comprised of senior practitioners with extensive experience. We advise on a wide range of commercial business, migration, dispute resolution and personal law. Click here to download our corporate brochure or visit our website www.lordlaw.com.au where you will find more detail about all our area of practice and recent publications.