

HOW TO CONDUCT AN ASSET PROTECTION AUDIT



Overview

What

What are the potential risks?

Where

Where can you find them?

How

How do you manage it for your client?

When

When is it too late?

Case Study

*looks at what to look for when conducting an audit

*does not deal with family law

1. What



What are the potential risks?



“



Individual conducting a business:

- 1. Recklessly exposes a person to risk of death or serious injury – up to \$600,000/5 years jail*
 - 2. Failure to comply with health and safety duty that exposes a person to risk of death, serious injury or illness – up to \$300,000*
 - 3. Failure to comply with health and safety duty – up to \$100,000*
- cf Division 5, Work Health and Safety Act 2011 (Cth)

“



*The director of a company that fails to meet a superannuation guarantee charge liability in full by the due date automatically becomes **personally liable** for a penalty equal to the unpaid amount.*

cf Superannuation Guarantee (Administration) Act 1992 (Cth)

WHAT ARE THE RISKS

- Employer duties and obligations
- Director duties
- Risk of business/profession
- Liabilities
- Guarantees
- Day to day risk

HOW CAN ASSET PROTECTION HELP



THREE STEP GUIDE TO ASSET PROTECTION

- Best practice
- Insurance
- Structure

2. Where



Where can you find the risk?



WHERE CAN YOU FIND THE RISK?

- For an individual?
- For a company?
- For a trust?
- Superannuation?

FOR AN INDIVIDUAL

- High-risk professions*
- Officeholders
- Holders of personal guarantees

FOR A COMPANY

- Shareholder?
 - *Salomon v Salomon & Co* [1897] AC 22
- Director

“

The company...is a distinct person from its shareholders. The shareholders are not liable to creditors for the debts of the company. The shareholders do not own the property of the company...

*Latham CJ, The King v Portus; ex parte
Federated Clerks Union of Australia (1949) 79
CLR 42*

FOR A TRUST

- Beneficiary?
 - Depends on type of trust
- Appointor?
 - Role is personal in nature
- Trustee?
 - Target person

FOR A TRUST – NOTES FOR TRUSTEE

- Target person
- Case law and legislation provides indemnity to trust assets
- *Pseudos v Commonwealth Bank of Australia (No 2)* [2017] FCA 19
- Potential indemnity against beneficiaries

FOR A TRUST – NOTES FOR BENEFICIARIES

- J W Broomhead (Vic) Pty Ltd (in liq) v J W Broomhead Pty Ltd [1985] VR 891
- Above case related to a unit trust as opposed to a discretionary trust (1985) 2 NSWLR 623
- McLean v Burns Philip Trustee Co Pty Ltd

FOR A TRUST – RICHSTAR

- Reverse the issue (trust at risk of individual)
- *Re Richstar (No 6)* [2006] FCA 814
- Ruled by the then Justice French
- *Fordyce v Ryan* [2016] QSC 307
- Extra conservatives contemplate Richstar

3. How



How do you manage the risks?



HOW DO YOU MANAGE THE RISKS

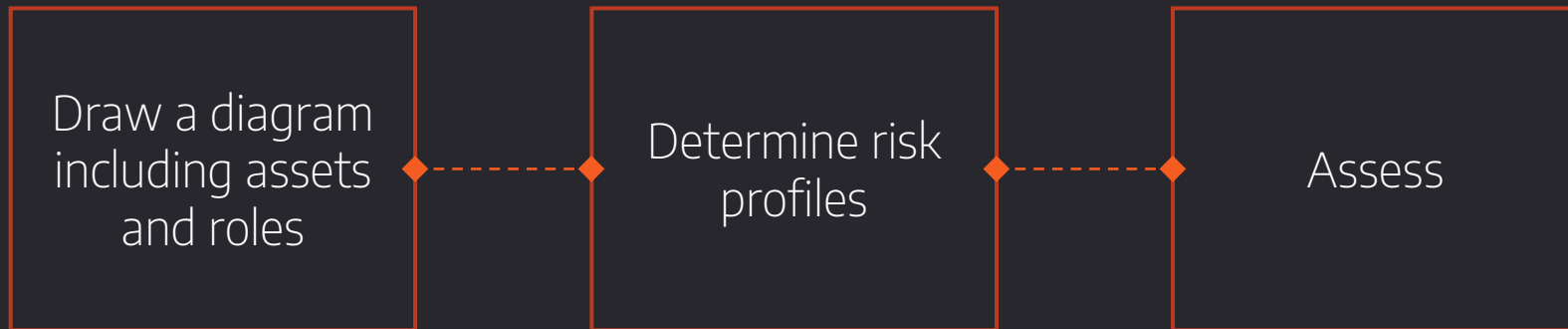
- High risk person holds less assets
- Low risk person holds more assets*
- High risk person holds roles that carry risk
- Low risk person holds no roles that carry risk

- *Estate planning

HOW DO YOU MANAGE THE RISKS

- Directorship and trustee roles carry risk, remove low risk individuals
- Certain assets carry risk (investment properties) but also value – consider utilising a trust or company
- Segregate risk if commercially viable

LOOKING AT IT DIAGRAMMATICALLY



4. When



When is it too late?



THE CLAWBACK

Restructures limited

There is various legislation nationwide the reduces the effectiveness of restructures for asset protection purposes

Property Law Acts

Each State/Territory has their own provision in their property law act enabling a creditor to reverse transactions intended to hinder their ability to recoup

Bankruptcy Act

Section 120 and 121 of the Bankruptcy provides clawback opportunities

SIS Act

Sections 128A to 128N provide clawback provisions for contributions made after 28.7.06 if the purpose was to avoid creditors. See the irony with super

Corporations Act

There are similar provisions in the Corporations Act reversing transactions made in a prejudicial manner

Division 4A

Dubbed the 'trust busting provisions' - for another day

“



If you are being dodgy, there is an unlimited time period to claw back any transactions embedded in various legislation across the country

Me

WHEN IS IT TOO LATE

- Change of directorships
 - Too late
- Change of trustees
 - Too late
- Moving of assets
 - Clawback provisions

5. Case study



True story



CASE STUDY

- Bob and Karen has come to you to undertake an asset protection review of their circumstances.
- Bob and Karen are directors of Insurance Fixers Pty Ltd, a company that operates a business in repairing homes that qualify with relevant insurance companies. Insurance Fixers Pty Ltd is the relevant entity engaging with sub-contractors and employees and also holds the contracts with the relevant insurance companies and retained earnings (approximately \$1.4m).
- Insurance Fixers Pty Ltd is solely owned by The Bob and Karen Family Trust which Bob and Karen are joint trustees.
- The Bob and Karen Family Trust also owns various investment properties and shares in New Business Venture Pty Ltd.

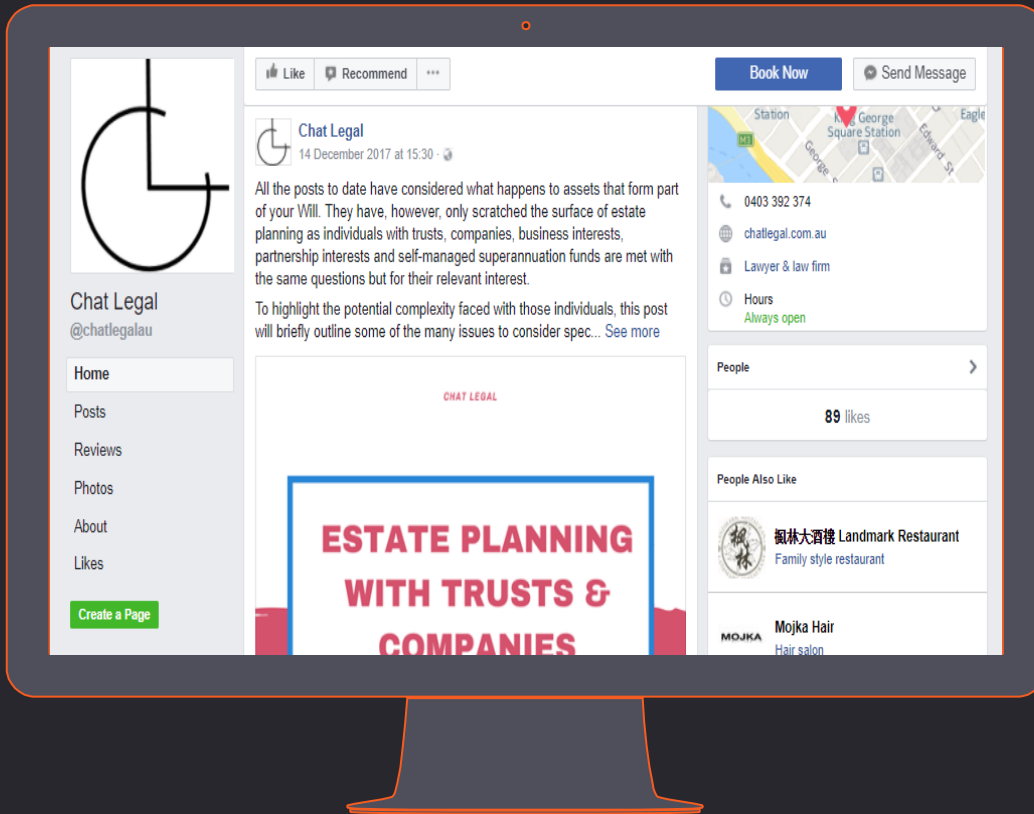
CASE STUDY

- New Business Venture Pty Ltd is currently dormant but it is intended that once the contracts expire for Insurance Fixers Pty Ltd, Bob will go on to conduct a new business from New Business Venture Pty Ltd. Bob is the sole director of this company.
- Karen is a stay at home mum and they both have two minor children. Karen undertakes no work for Insurance Fixers Pty Ltd and she receives a distribution from The Bob and Karen Family Trust equal to such profit generated from the trust.
- Bob owns the family home in his name and a joint bank account with Karen.
- Karen holds no personal assets other than a joint bank account with Bob.

RECOMMENDATIONS

OTHER COMMON EXAMPLES

- The home owned jointly
- Joint bank accounts
- Multiple assets in single structure
- Segregating business divisions



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CREDITS

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THANKS!

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