



Chat Legal Pty Ltd
ABN 64 621 391 553
letschat@chatlegal.com.au
PO Box 74, Underwood, QLD 4119
<https://chatlegal.com.au>

Let's chat

Asset protection, documentation and keeping it right - July 2026

With:

Darius Hii – Tax and estate planning lawyer, Chartered Tax Advisor, and Director at Chat Legal Pty Ltd

Information provided is general in nature; precise application depends on specific circumstances



Asset protection – the service

- Sustained rise in personal wealth bringing asset protection into mainstream planning
- Ordinary families now hold significant assets through property, superannuation, and small-to-medium business interests
- Asset protection – the service
 - Rise of information means clients asking sharper questions
 - Rise of information means clients asking about ‘things that are just not relevant’
 - Balancing: bankruptcy/creditor claims, estate/family provision claims, and tax
 - A robust bankruptcy shield may undermine testamentary flexibility, and vice versa
 - Costs, limitations, and potential collisions with tax rules



Understanding Client Objectives

- Asset protection means different things to different clients – always clarify the objective at the outset
 - Protection against personal bankruptcy
 - Protection in relationship breakdown or divorce
 - Protection from risks arising from corporate/trust activities
 - Protection from disgruntled family members
 - Protecting assets for (or from) future generations
- Three core principles underpin any effective structure
 - Limited liability: companies protect shareholders from trust/business liabilities
 - The domino effect: single ownership exposes all assets to one claim
 - The asset protection triangle: best practice + insurance + structure
- Identify risk profiles: high vs low risk
 - Maximise assets/control held by the low risk individual
 - Minimise assets/control held by the high risk individual

Gift and Loan Back Arrangements



Chat Legal Pty Ltd
Let's have a chat

- A strategy where it is impractical to transfer an asset to a safe harbour entity
 - Common where the existing home is in the at-risk spouse's name and transfer costs are prohibitive
 - Also used where both spouses have high risk profiles
- How it works
 - Establish a new safe harbour trust with appropriate succession mechanisms
 - The at-risk individual gifts the asset value to the trust
 - The trust immediately lends the same amount back and registers a mortgage over the asset
 - Net effect: asset stays in at-risk individual's name, but trust holds security interest as a secured creditor
- Key implementation requirements
 - Contemporaneous, properly executed legal documentation (see *Atia v Nusbaum* [2011] QSC 44)
 - Lender must be a genuine safe harbour – at-risk individual must not control the trust
 - Regularly 'top up' gift/loan amounts as property value increases
 - Obtain existing lender consent; manage Division 7A obligations if a company is involved



Vestey Trusts: A Cautionary Tale

- Vestey Trusts were promoted as ‘impenetrable’ asset protection – the Federal Court disagreed
 - Named after the British Vestey family; repurposed in Australia as gift and loan-back structures with caveats
- Regulatory action
 - 2022: ASIC imposed a four-year ban on the promoter (later overturned by the AAT)
 - December 2022: ATO warning on SMSF-related asset protection schemes
 - April 2024: ACCC succeeded in Federal Court – ACCC v Master Wealth Control Pty Ltd [2024] FCA 344
- Structural defects found by the Federal Court
 - Could only protect assets up to the amount of the secured loan – often far less than full equity
 - Promotional materials misrepresented the law and the Sharrment case (which did not support the Vestey model)
 - Basic legal competence errors in trust deeds and mortgage documentation
- Lesson: structures must be substantively sound, not just formally documented



Bankruptcy Act: Clawback Rules

- Key clawback periods under the Bankruptcy Act 1966 (Cth)
 - Preferential payments to unsecured creditors: up to 6 months prior to bankruptcy
 - Undervalued transactions (gifts/transfers below market value): up to 5 years prior to bankruptcy
 - Transactions intended to defeat creditors: no time limit
- Motto: 'Act early and act often' – implement structures well before any trouble appears
- Bosanac Case [2022] HCA: presumption of advancement vs resulting trust
 - Mrs Bosanac held sole legal title to family home; Mr Bosanac co-funded the purchase
 - Commissioner argued a resulting trust arose in favour of Mr Bosanac (50% interest)
 - High Court: strong evidence of parties' actual intention prevailed; Mrs Bosanac held the property beneficially
- Cummins Case: clawback can apply even 13+ years later if insolvency was foreseeable at the time of the gift
- Best practice: document solvency and the genuine purpose of any gift contemporaneously



Succession Act: Notional Estate

- NSW is unique: courts can 'claw back' assets transferred before death into the notional estate
 - Analogous to bankruptcy clawback: transactions within 3 years of death are vulnerable
 - Scope is incredibly broad – includes both acts and omissions
- Recent NSW cases have found these to be caught by the rules
 - Failing to sever joint tenancy (depriving estate of the deceased's half share)
 - Binding death benefit nominations in favour of individuals rather than the estate
 - Failure to revoke a pre-existing nomination within the 3-year window
- Queensland: Permewan Case [2022] QSC 114 – de facto clawback risk
 - Deceased gifted \$3M to a family trust and borrowed it back; net estate value was nil
 - Court found the arrangement was a sham and contrary to public policy on family provision
 - Key lesson: arrangements must be genuinely implemented, not merely paper transactions
- Contrast: Mead v Lemon [2015] – court acknowledged testators can freely dispose of assets during lifetime



Trusts and the Estate Plan

- Discretionary trust beneficiaries have no proprietary right to trust assets
 - Trustees have full discretion to distribute income/capital; beneficiaries can only insist on proper administration
 - *Owies v JJE Nominees* [2022]: trustees must give real and genuine consideration to all beneficiaries
- Transition of control: greatest risk arises on death or incapacity of the controller
 - Corporate trustee recommended for smooth succession – but a tailored constitution is also required
 - Without controls, a 2/3 shareholder majority could exclude a sibling from decision-making
- Key provisions for a tailored company constitution
 - Specify who may own shares; regulate director appointment rights (e.g. one director per family branch)
 - Specify voting thresholds for major decisions – unanimous consent for constitutional changes
 - Note: cannot fetter trustee discretion as to how distributions are made, only how decisions are reached
- Consider vulnerable beneficiaries: financial immaturity, addiction, disability, overseas tax exposure



Some key themes

- No single strategy is a silver bullet – protection demands layered, tailored, and documented approaches
- The asset protection triangle remains the guiding framework
 - Best practice: minimise the likelihood of claims arising in the first place
 - Insurance: first line of loss transfer
 - Structure: final layer of protection when best practice and insurance have failed
- Key themes from the case law
 - Substance over form: the genuine intent and operation of arrangements is scrutinised
 - Documentation matters: contemporaneous evidence of intent, solvency and genuine transactions is critical
 - Timing matters: act early – clawback periods can reach back 5 years (or indefinitely for intent to defraud)
- Practitioner obligations: avoid untested schemes, maintain vigilance, anchor advice in settled legal authority
 - Regulatory and judicial intervention (ASIC, ATO, ACCC, Federal Court) underscores professional liability risk



Structuring for nought

- Discussed the importance of proper structuring advice
- Also need to consider the illusion proper structuring may provide:
 - Just entering into the paperwork isn't enough
 - Ongoing compliance a must
- Need to consider:
 - Risk the structure is not aligned with objective, commercial reality or risk tolerance of client
 - Risk good design undermined by inconsistent execution over time – including failings in banking, cashflow discipline, documentation and governance – concluding in scrutiny amidst dispute (ATO/financier/purchaser)



Just not the right structure

- Is the structure just too complex?
 - Three structures to run a loss-making bookstore?
- Designed by advisors, run by no one?
 - Service trust arrangement with employing entities and agreements in place requiring payments. What happens when making payments become too tiresome and are replaced with year-end journals with gaps arising?
- Is the structure based on assumptions that are not sustainable?
 - Discretionary trust bucket company structures established on the basis trading profits remain profitable – but in practice cashflow deteriorates (resulting an increase in UPEs)



Just not the right structure

- Is the structure designed on everything being done perfectly?
 - What happens when a 30 June minute or declaration is missed or tax planning advice is skipped?
- Does the structure require excessive discretionary decision-making actions or nuanced distinctions to be made?
 - Structure requires multiple decisions to be made throughout the year supported by documentation. Eventually the client fails to maintain record obligations leaving the paperwork to others to reduce compliance work with advisors
- Are issues merely delayed?
 - Over time, good practice deteriorates. Failure to execute documents appropriately rises and cash transfers are left to journal entries.



Follow the money

- Contemporaneous record keeping (in one form or another) explains the money flow
 - Leaving it for the accountant/advisor increases the risk of memory gap
- Where wrong bank accounts used to transact – risk increases further
- How will discrepancies be explained in the event of a dispute
- Can bank statements support what is being said
- Are other issues arising – Division 7A; trust law issues; asset protection risk
- Upon divergence – the integrity fractures
- Failure of proper record keeping reason to have separate bank accounts even where same trustee over multiple trusts



Follow the money

- Are the right people in control of the relevant bank accounts?
 - Are they in the right roles?
- Ensuring 'document payments' are actually paid (i.e. service fees/licence fees/interest payments)
 - Where interest payments capitalised – does the loan agreement allow it?
- Are loans documented – or are they forgotten and remains persisting
- Is your client well informed and able to appreciate the distinction?



Governance and administration

- Lack of contemporaneous documents reflects lack of intention and a gap of decision-making process
- Lack of documentation leads to subsequent documentation reflecting the outcome rather than the decision at the time
 - Creates gaps and invites adverse inferences
 - What was the actual history at the time of the decision?
- Gradual delegating of control
 - Creates asset protection risk where formal control deferred to a shadow
- Too much weight placed on templates
 - Each transaction or series of transactions should require thought to the facts and circumstances at that point in time
 - Are amendments required to treat the style of transaction?



Inter-entity flows

- Are agreements still valid and appropriate?
 - Has the fee changed without the agreement being updated?
- Are services actually being provided?
- Are book entries standing in for cash?
- Is cash just recycled?
- Can the above be explained in the event of a dispute?



How to stand it up?

- Be the trusted advisor
- Don't let odd, lax things slide – nip it in the bud
- Ask if things actually make sense?
- Are inconsistencies frequent and increasing?
- Are clients actually open to the governance having the various arrangements?
- Do inter-entity flows make sense?
- Ask 'how is the family' and are the control roles appropriate
- Good structuring requires an ongoing commitment



Budget update

- CGT and negative gearing changes through
- LRBA ban for residential property
- SBCGT turnover test for 50% active asset reduction increased to \$10 million
- Testamentary trusts excluded from 30% trust distribution tax – subject to legislation:
 - Beneficiaries limited to individuals and charities (does not include trust/company beneficiaries – would be fair)
 - Genuine requirements
 - Only applying to assets that form part of estate (does not include assets injected into testamentary trust – would be fair)



A SBCGT Concession note

- Does not increase MNAV
- Does not solve fact Trust/Individuals do not have an additional 50% CGT discount – however, aligns tax treatment on proceeds to be the same regardless of share sale or asset sale
- Note for small-medium business operations; it will be an asset sale instead of a share sale (as the due diligence required for a share sale can be prohibitive)
- Fact that there will be some clients who would now be eligible to a 50% Active Asset Reduction who would not have been eligible previously



Example

- Trading Company with Individual Shareholder (Husband)
 - 2021 year: \$1.7m turnover
 - 2022 year: \$1.992m turnover
 - 2023 year: >\$2m turnover
- Assets:
 - Husband and Wife: Home
 - Husband and Wife: Investment Property (\$1,045,000 - \$640,000)
 - Husband and Wife: Investment Property (\$980,000 - \$900,000)
 - Family Trust: Investment Property (\$1,400,000 - \$600,000)
 - Investment Property was actually rezoned and valued closer to \$3,000,000
 - Family Trust: 40% interest in business commercial property
 - SMSF: 60% interest in business commercial property



Example

- Offer before 30 June 2022: \$3,350,000 (80% upfront, 20% earnout)
- Offer after 30 June 2022: \$3,350,000 (80% upfront, 20% earnout)
- Offer after 30 June 2023: \$5,000,000 (80% upfront, 20% earnout)
- Business sale agreement offer
- Sign contract before 30 June 2022 – FY2021 turnover test met
- Sign contract after 30 June 2022 – FY2022 turnover test could fail
- The difference between SBCGT Concessions on \$3,350,000 or none at all
- With the increased turnover, would even be available for the increased offer

Contact details

Patrick Ellwood

Director, Clover Law Pty Ltd | Fellow of The Tax Institute (FTI)

patrick@cloverlaw.com.au

0400 503 111