

How to avoid losing your home when business goes bad

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Topics

1. Risks
2. Managing risk via insurance
3. Asset protection strategies

Risks



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Zaps Transport (Aust) Pty Ltd and Ors

- Tobacco stolen from a licensed premises
- License held by the corporation
- The corporation was insolvent
- Director – Bankrupt
- Son of director, was the warehouse manager
- Duty on tobacco about \$250,000

Zaps Transport (Aust) Pty Ltd and Ors

- Customs legislation strict – duty must be paid on warehoused goods which are not kept safely – there is only the Godzilla defence
- Who is liable – a person entrusted with the possession, custody or control of the goods
- Manager – oversaw operations, made operational decisions, big decisions had to be reported to the director

Summary on individual liability

Can't hide behind the corporation – the legislation is too wide

Director

- He was in control of the goods in his capacity as an officer of the company
- He was generally in charge of the company

Manager

- He directed what was to happen to the goods
- He could accept or release the goods
- Employees followed his orders in respect of the goods

Appeal

- The case is being appealed
- Difficulty is that past cases have said that the relevant section is meant to cover more than just the warehouse licensee
- Does it indicate the intent of the Government to target individuals
- It not just “can they” but “will they”

Other areas of risk

- s243T and 243U – liability on the person that makes, or causes to be made, the false statement
- s236 – you have committed an offence under the act if you aid, abet, counsel or procure directly or indirectly the commission of any offence
- Personal guarantees
- Directors liability – insolvent trading
- Unless acting as an individual broker – you should not be considered an “owner”
- False or misleading statements – employees can be liable for statement made in trade or commerce
- Negligence

Director's liabilities

Many pieces of legislation contain circumstances where directors will be liable for the acts of the company – examples include:

- Competition and Consumer Act
- Occupational Health and Safety
- Environmental Protection
- Taxation
- Superannuation
- Customs

Primary risk is where the company is insolvent or the director has not exercised due diligence

Managing risk via insurance

James Cotis – CEO

Insurance Logical Pty Ltd trading as
Logical Financial Management

Asset protection strategies

- Assets under attack
- Getting your structure right from the start
- Changing ownership of personal assets
- Using mortgages
- Using trusts and superannuation
- Segregating business assets from business risk
- Insurance

How can your assets be attacked?

- Liability / debt enforcement process
- Court order / judgment debt
- Enforcement action
- Bankruptcy

Bankruptcy

- Critical to understand bankruptcy law because the Bankruptcy Act 1966 (Cth) limits what can be done to protect assets
- The trustee in bankruptcy can seek to unwind transactions / reclaim assets that were previously held by a bankrupt where:
 - (a) a debtor paid certain creditors in preference to others; or
 - (b) a debtor has attempted to remove property which would otherwise generally have been available to creditors

Getting your structure right from the start

PREVENTION IS THE BEST CURE!



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Changing the ownership of personal assets: Gift / transfer of a Family Home

- One of the most common strategies is changing the ownership of the family home into the name of a risk-free or low-risk partner or relative
- No capital gains tax (CGT) on transfer of main residence
- No stamp duty in most states and territories for transfers between spouses or domestic partners
- No land tax in most states and territories (if person holding the property occupies it as their PPOr)
- Land titles office registration and legal fees

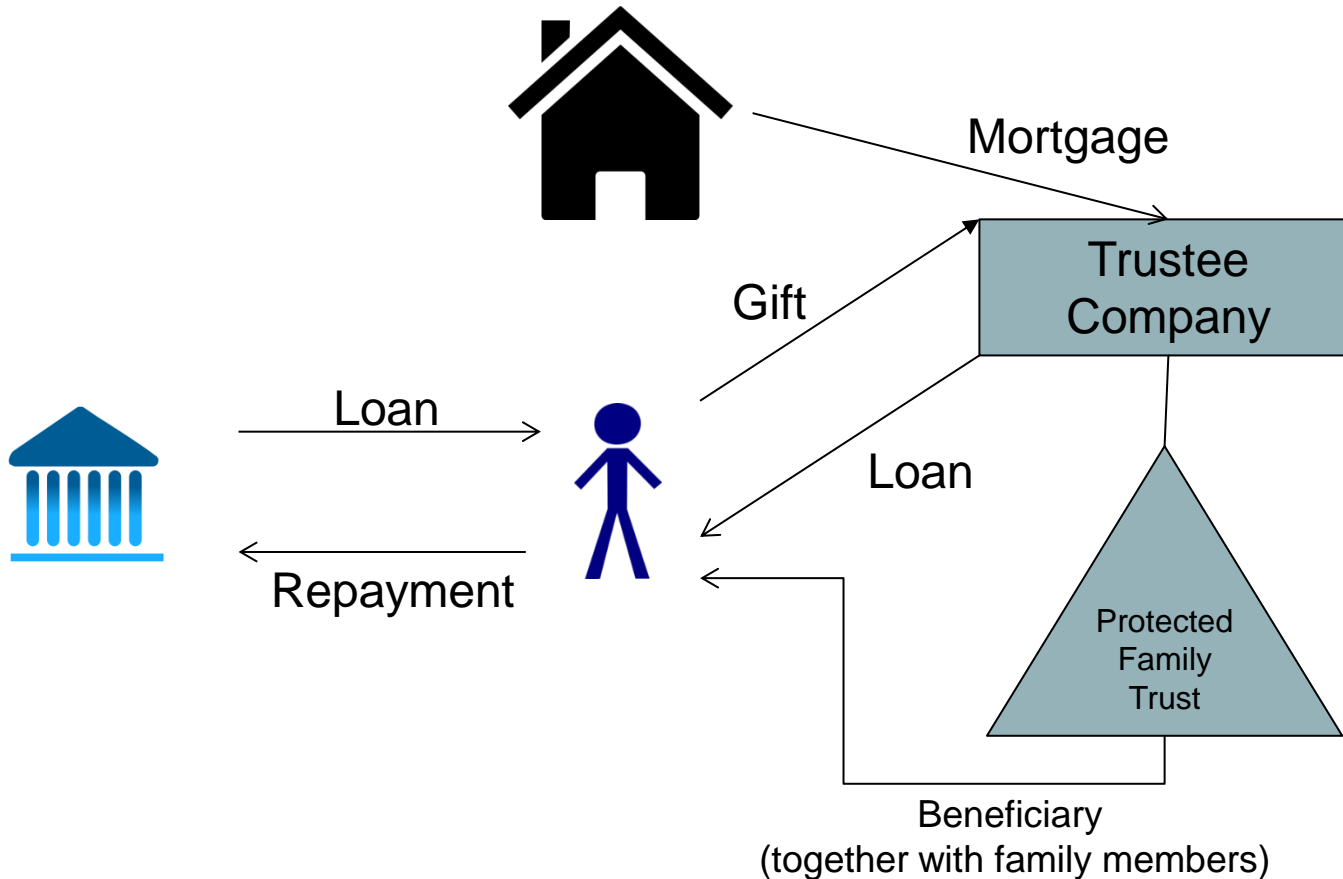
Changing the ownership of personal assets: Gift / transfer of Investment Property

- This option also involves the transfer into the name of a risk-free or low-risk partner or relative, or trust
- CGT may apply on transfer (unless capital loss, pre-CGT or other exemption applies)
- No stamp duty in Victoria for transfers between spouses or domestic partners (note: stamp duty payable in some other states / territories including NSW)
- May increase land tax and income tax payable because interest held by a single holder (if trust used land tax surcharge may apply)
- Land titles office registration and legal fees

Changing the ownership of personal assets: Gift / transfer of other investments, e.g. shares

- This option also involves the transfer into the name of a risk-free or low-risk partner or relative, or trust
- CGT may apply on transfer (unless capital loss, pre-CGT or other exemption applies)
- Possible stamp duty (depending on state and whether interest is in an entity that is a landholder)
- No land tax payable but increased income tax because asset held by a single holder
- Transfer fees

Using mortgages: gift and loan back with mortgage



Using trusts and superannuation

- When personal assets are realised or income earned those funds and any replacement assets should not be held personally (e.g. gift to trust or contribute to superannuation)
- Subject to superannuation law requirements, investment properties that are “business real property” can be contributed to self-managed superannuation funds

Separating business assets from business risk

- When structuring a business the business assets should be separated from the business and operational risk
- For example, have the warehouse which is used in the business owned in a separate investment company / trust which leases it back to the trading entity
- By doing this if the trading entity is sued or becomes insolvent, the warehouse will be protected

Don't forget...

- Insurance is a valuable tool
- Loans owing to you from companies or trusts are personal assets subject to attack
- Our presentation today has focused on business risks – family law brings other challenges
- Future inheritances will become your assets (i.e. talk to your parents about their wills – encourage them to get discretionary testamentary trust wills)
- **Prevention is the best cure!**

Questions



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