



Asset Protection

Client Guide

# Asset Protection Client Guide



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**TODD** took advice and set up a company to operate his consultancy business. He did not want to be personally responsible for the risks associated with giving advice and he was told that because any contract would be between the company and the customer, the company would be liable and not Todd. Todd gave advice as a consultant and although he considered the advice was sound, a court decided that the company was liable for breach of contract. The court also found that Todd was personally liable for his own personal negligence and had to sell all his substantial assets to pay the damages suffered by the customer.

**MARK** had risked everything he had on a commercial venture which had gone sour and he only had three months to go before he was discharged from bankruptcy. His parents passed away leaving him an inheritance of \$500,000. Mark's trustee in bankruptcy took the inheritance as the trustee is entitled to do and shared it out among the creditors.

**BRIAN'S** business was running well and he had, over the years, borrowed substantial money to fund the growth of his business and to gear up to handle the work. The government changed the regulations relating to his business activities and the business practically dried up overnight. The business assets he had invested in were worth

a fraction of what he paid. The proceeds of sale did not cover what he owed to the bank. All his assets, even those he had not given security over to the bank, were needed to settle the debt.

**BETTY** had finally signed her Will. Her son, Tom, had treated her disgracefully over the years and Betty was determined that Tom did not benefit from her estate. Betty's Will leaves everything to her other children and specifically excludes Tom from receiving any benefit. The problem is that the law does not allow Betty to do what she wants. Tom still has the right to challenge his mother's Will and the court may decide that Tom should be entitled to some of Betty's estate. Betty needs to do more than just exclude Tom from her Will if she wants the comfort of knowing that he will not get his hands on her property. There are a number of things Betty can do which will see her wishes met provided she takes the right advice.

**PAUL** asked one of his staff members, Ian, to take Paul's car and deliver some product to a customer after lunch. Ian caused an accident writing off the other car – a \$200,000 Mercedes. Paul assumed his insurance would cover it, but it turned out that Ian had consumed a few beers at lunch and the insurance company refused to pay. Because Ian was an employee engaged on business for his boss, Paul was liable for all loss suffered by Ian's negligence.



## What is asset protection about?

If you are in business - you are at risk of losing all your assets. It does not matter whether you have a small service business or whether you practise a profession or a trade - you are at risk of someone making a claim against you and your assets.

Imagine you are 55 having spent your entire life working hard, taking commercial risks, juggling the never ending problems of customers, staff, suppliers, banks, the tax man, etc - hanging in there and gradually building your wealth for an enjoyable retirement and to pass on what is left to your family.

Imagine then a claim coming out of the blue - one that you had no control over and may have little merit but a claim a court nonetheless decides you must pay - a claim that will take all your wealth or more to meet. You are suddenly facing bankruptcy and have little energy or time to start over again.

Asset protection is about reviewing the way you carry on your business, trade or profession and how you own your wealth to ensure that, if the worst occurs, you do not lose everything you have worked so hard to create.

We are not talking about disposing of your assets to avoid your creditors where you are about to go bankrupt. By then it is too late. Trying to protect your assets in those circumstances may well do more harm than good and could even lead to a term in jail.

We are talking about sensibly organising your affairs while things are going well.

## Is asset protection just for those in business?

Not necessarily. With the number of mixed families arising from an increasing rate of divorce there are more people challenging Wills in court - claims made by disgruntled family members (such as estranged spouses, children and step children), chasing more than they have been left in the Will.

The law does not allow you to be the sole judge

of who you wish to give your property to on your death. If your Will is challenged, the court may decide to give the person making the claim a large part of your estate against your wishes. Asset protection is also about organising your affairs so as to prevent that occurring.

> TED was a glazier carrying on business in partnership with his wife. He installed a mirror behind a bar in a local hotel. On a busy Saturday night the mirror fell - smashing bottles and glasses and severely injuring one of the bar staff. Ted was found liable. He had no insurance and he and his wife lost everything they owned - family home included.

## If my business is going well and I can see no risk of it failing why should I do anything?

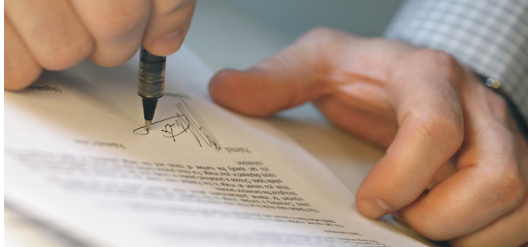
You will have a better appreciation of the risk of your business failing than we will but there is always a risk of change in business conditions, competitors starting price wars, loss of major customers, change in government regulations etc., that could turn a business around.

No matter how strong the business, there is always a risk that the business (or some other commercial venture you become involved in) will fail. There are also all those unexpected things that can occur like those in the stories throughout this booklet.

You may be prepared to risk the capital you inject into your business or a commercial venture and work to make it succeed.

If it doesn't succeed then you may be prepared to lose what you put into the venture.

However you are not likely to be prepared to lose everything you own. Unfortunately that may not be your choice unless you do something to protect the wealth that you do not want to expose to the risk.



### If I am very careful and don't make mistakes do I need to bother doing anything?

Don't forget that asset protection is also about preventing successful challenges to your Will by disgruntled family members. If you are in business, then no matter what level of control you have over your business activities, there is always a risk of making a mistake or someone else doing something over which you have little control - particularly where you have employees. An employer is liable for the negligent acts of employees if the act is within the scope of the employee's authority. This includes where the employee was employed to perform the act or it is an act which was incidental to the employment.

If you supply services under a contract with a major customer that insists on using its form of supply contract (such as is common in the mining industry) you are likely to find there is a term of that contract that makes you liable to indemnify the customer against various matters - such as claims for injuries to your employees while on site - even if the claim arose from the negligence of the customer itself.

If you lease your business premises then check the terms of your lease. You will often find that a commercial lease includes a clause obliging tenants to indemnify the landlord against claims by others in certain situations.

It is also common for major suppliers to insist on you signing supply contracts and personal guarantees. The guarantees often contain clauses by which you charge all your

personal property and give the supplier a power of attorney. These clauses may even entitle the supplier to lodge caveats over your property and register a mortgage over your family home - ultimately forcing a sale of the home.

➤ MARY ran a retail business. She asked Lucy, one of her staff, to go to the post office to collect the mail using Lucy's own car. It was raining and Lucy caused a concertina accident, damaging a number of cars and destroying the front of a shop. Unbeknownst to Mary, there was no third party property damage insurance on Lucy's car. Because Lucy was an employee engaged on business for her boss, Mary was liable for all loss suffered as a result of Lucy's negligence.

### I have set up a company to own and operate my business - so why do I need to worry?

Having set up a company to operate the business is often a great first step to limit your personal liability (although it may not produce the best tax result with respect to capital gains down the track) - but even with a company you are still at risk.

#### Personal negligence

You are personally liable to compensate anyone who has suffered loss as a result of your personal negligence. This applies even if you have set up a company to carry on the business and you are merely an employee or working director of the company.

#### Personal guarantees

Even if you set up a company to operate your business in order to limit your personal liability we all know that banks, landlords, trade suppliers and others will not deal

with you unless you, the director, sign a personal guarantee. If the business fails then you are still liable for any liability you have guaranteed.

### **Insolvent trading by a company**

If you allow your company to trade when it cannot pay its debts then, as a director, you may be personally liable to the creditors even if you haven't personally guaranteed them.

### **Alleged breaches of Workplace Health & Safety Regulations**

There is a tendency for the authorities to take the view that if an accident occurs then someone must be at fault. The directors of a company can often face large punitive fines - even if the injury occurs, not to an employee of the company, but to a visitor to the workplace.

### **Directors of corporate trustees**

There has been a recent court decision which found that the directors of a company that is trustee of a trust are personally liable for the liabilities of the trust so that, if there are insufficient trust assets, a director's own assets may be used to meet the debt.

### **Unpaid PAYG tax, unpaid company tax, unpaid superannuation**

These can result in personal liability for the directors.

➤ FOR 40 years Ron had been the director of his own company and had run an electrical contracting business. He had retired years ago and thought that all the problems with running his own business were behind him. Unbeknownst to Ron, he had left behind a time bomb. One of the shops he had worked on had an exposed wire in the ceiling cavity. Someone had been electrocuted and the family sued for over \$450,000.00. The company had no assets and in any event it had been wound up years ago.

Ron was therefore in the firing line. Unfortunately Ron had not maintained run off insurance and so had to use the wealth he had relied upon for his retirement to defend the claim and to pay the judgment.

### **I have insurance so why should I worry?**

You are certainly encouraged to keep insurance in place for all risks that can be economically covered including public liability, product liability, professional indemnity - but you may be surprised to learn that some of the risks are uninsured or even uninsurable. For example, you will find it difficult to get insurance against fines for breaches of Workplace Health and Safety Regulations or to get insurance for a liability that you have agreed to accept under a contract - such as a service contract or a commercial lease.

You may not always be able to get insurance. For example, if you do have a major claim against you that is covered by insurance, you may well find that the insurance company won't insure you again. The unfavourable claims history may also mean that other insurance companies won't touch you. Don't assume that you will always be able to get insurance.

Even if you have insurance you are still at risk. The conditions of insurance may not be met. The fine print in the insurance policy may result in the claim falling outside the risks covered by the policy.

It certainly does not happen very often but there is always a risk that your insurance company will not be there when you most need it - as many former HIH and FAI customers can testify.

Believe it or not there are also many cases where the renewal of insurance is overlooked because the premium renewal notice was not received or it went astray in the system somewhere.



In the past we all relied upon our insurance to cover any risk that we might unexpectedly become liable. The decision as to who should own property was dictated almost solely by a desire to minimise tax. Now there is an increasing recognition of the need to focus on asset protection as well.

There is also an increasing awareness by a number of people of the need to protect against challenges to their Will.

### Why the change in attitude?

The change in attitude to the risks of being in business largely resulted from the collapse of insurance companies like HIH and FAI and the problems encountered by the medical defence fund, UMP.

The comfort that we all took from having insurance to cover those unforeseen risks is no longer there.

The collapse of HIH and FAI forced us all to look at and better appreciate the risks involved in doing what we all do. It led to a growing realisation that risk is imposed on anyone in business and anyone who practises a profession or trade. There is no avoiding it.

We therefore set out to find ways to guard against that risk.

In relation to potential challenges against your wishes in your Will - this is becoming more of an issue as a result of the increased rate of relationship breakdown and legislation that gives rights to married and de facto couples (including those of the same sex)

and their children and step children to make challenges. Even children of a de facto spouse may be able to make a claim against your estate.

### Okay - I need to at least look at things but what might I need to do?

Almost all asset protection strategies are based on the simple notion of separating assets and risk. We therefore set out to find ways to separate your risks from your assets in the most cost effective way.

A traditional asset protection strategy often employed is for you to gift the assets in your name to some trusted person or entity that does not take any risk.

It certainly sounds simple but there are problems with just gifting assets away.

### What sort of problems?

#### Stamp Duty

Stamp Duty is often payable on the transfer of property even if it is gifted. As an example - if you give away land in Queensland worth \$250,000.00 then a stamp duty bill of \$7,175.00 is payable.

➤ BRETT was in partnership with Joe in an accounting business. Brett was asked by a client to look after some of the client's investments while the client was overseas. Unfortunately Brett had a gambling problem and secretly "borrowed" the money which of course he could not repay. Because Joe was in partnership with him, Joe was liable as well.

#### Capital Gains Tax

The transfer of the asset may trigger off a capital gains tax liability - this applies even if

the asset is gifted. The tax man still charges you capital gains tax as if you had sold the property at its market value.

### Loss of CGT exemption

If your interest in your principal place of residence is transferred there may be a loss of the capital gains tax exemption available for increases in the value of the residence after the house is transferred.

### Loss of pre-CGT status

If the asset you wish to gift away has been owned by you since before the introduction of capital gains tax the transfer of the asset will mean a loss of pre-CGT status.

### Loss of negative gearing benefits

If you have negatively geared the acquisition of an asset (such as a share portfolio) then transferring the asset out of your name may result in the loss of negative gearing benefits.

## If I choose to ignore these costs and give away my assets will it protect the assets?

We would love to give you a definite answer but the simple truth is that giving away your property does not necessarily protect the property from your trustee in bankruptcy - and if you are making the gift to avoid challenges to your Will then there may also be a number of other things that need to be done to protect your position.

In relation to bankruptcy, there are various rules that help a trustee recover property that has been given away - rules which allow the trustee to "clawback" money or other property. The rules even allow the bankruptcy trustee to claw back property that you have sold for less than its market value.

The rules are very complex and it would take a book to explain them all - but below is a "broad brush" outline of a couple of the rules. We cannot stress enough that this is just an

outline. Do not rely on our description of the rules in this brochure - take proper detailed advice on how they apply in your case.

### 4 year rule

If you give property away today or transfer it for less than its market value and go bankrupt within the next four years then the trustee can, in most cases, require the person receiving the property to give it back. Where the person paid something for the transfer then they are entitled to receive the payment back. There is usually no defence to this claim.

➤ BILL ran a business that supplied services to the mines. He signed one of their standard supply contracts in which he agreed to indemnify the mine against claims by his employees. His employee was injured at the mine as a result of the negligence of the mine. The mine was sued and claimed indemnity from Bill. Bill claimed on his WorkCover insurance but WorkCover would not insure him because Bill had agreed in the supply contract to be liable and was not covered for that liability by WorkCover. Bill had to defend the claim himself and ended up bankrupt.

### 5 year rule

This is similar to the four year rule in that if you give property away today or transfer it for less than its market value and go bankrupt in the next five years then the trustee can require the person receiving the property to give it back. Again, where the person paid something for the transfer then they are entitled to receive the payment back.

However in this case, the person receiving the property can defend the claim if they can demonstrate that you were solvent at the time that the gift or transfer was made.





Usually they demonstrate solvency by showing that you were able to pay debts as and when they become due.

This is where your accountant can certainly help - by preparing a statement of solvency which can then be used as evidence to defend an attempt by the bankruptcy trustee to clawback property under the five year rule.

➤ DARRYL wasn't even in business. He only played golf on the occasional industry golf day and invariably hit a ball along the ground about 50 metres. This day he timed it well and it sailed through the air into the back of the head of a player 180 metres up the fairway - causing serious brain injury. Darryl was found liable for negligence and lost everything he owned.

### Do I really have to do something now or can I wait until I get into financial trouble?

You should not wait for something to go wrong before you act. If you wait until something starts to go wrong then it may be too late to do anything.

Remember the four year rule - the bankruptcy trustee can clawback property given away in the four year period leading up to bankruptcy. The sooner you make a gift the sooner the four year period will start and finish.

The sooner you act the better. Don't wait for

things to go wrong - act now while things are going well.

### If I do wait until I get into trouble before transferring assets do I only have to worry about the trustee clawing back the property?

Some people may have an attitude of "Let's transfer it and see if the bankruptcy trustee recovers the asset - after all what's the worst that can happen?"

Unfortunately if, within twelve months before you become bankrupt, you give away property or create a charge on any property with intent to defraud your creditors then you may be guilty of an offence and can be imprisoned for up to three years. Even if you avoid a term in prison your period of bankruptcy can be extended by up to five years.

### Okay - Maybe I should do something but if there are all these costs of stamp duty and tax and problems with the bankruptcy rules is it really worth doing anything?

It is obviously up to you to make that decision. Our job is to alert you to the issues and give you some options. We are not trying to assist you avoid your legitimate creditors but to protect you from the things you have little control over. The great majority of us go through life without suffering bankruptcy but it would be hard to accept if you were one of the unlucky ones who suffered one of those "out of the blue" claims and lost everything when you could have taken some simple steps to gain some protection for your wealth.

There are problems with the cost of giving property away (the tax and stamp duty implications) and there are other ways to



protect your assets that do not incur these costs and can be much better suited to your particular needs. Everyone's position is different.

➤ DOCTOR David employed an overseas locum to do some work. David ensured the locum had medical negligence insurance while he was in Australia but when the locum went back overseas the insurance lapsed and David thought no more about it - until a patient claimed that the locum had been negligent and sued David for over \$500,000.00. Because the claim was made after the insurance lapsed, the insurance did not cover the claim. The locum could not be found overseas and so the patient sued David as the locum's employer. David's own medical insurance does not cover the negligence of his employees - neither does his public liability insurance.

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## What actually happens to my assets if I go bankrupt?

You stand to lose any assets in your own name such as your house, investment assets, your motor vehicle etc. This includes any shares you own in any private companies. You may even lose some of your superannuation entitlements. You may have to contribute a share of your income to your creditors. The extent to which you have to contribute depends on a number of factors including the number of family members who are financially dependent on you. Your source of income may be affected as your bankruptcy may result in the termination of a partnership or affect your entitlement to carry on a trade or profession. You may lose any inheritance that you receive during your bankruptcy. Property that is inherited becomes available to your creditors.

This is a good reason why you should also ask your parents or anyone else who may leave you an inheritance to review their Wills so as to not leave property directly to you but to leave it to you as trustee of a testamentary trust. Please ask us for our "Client Guide to Wills and Enduring Powers of Attorney" which explains this further. The bankruptcy trustee may also seek to recover assets held by associated entities or family members - particularly where the transfers were made in an attempt to avoid the property being available to your creditors.

## Well, what do I need to do?

To help you we need to review your existing business and investment structures and understand your plans and objectives.

We also need to identify your assets, debts and your family situation. We then need to devise a strategy that meets your particular requirements. The solution is rarely the same for any two people.

Sometimes the answer can be very simple such as transferring your half share in the family home to your spouse. Other times it is more complex.

To get the best result usually means involving your accountant and financial planner. Each of these advisors approaches the problem from a different perspective and can add value to the end result. Whatever you do, do not just rely on advice from well meaning friends. It is a complex area of law and it is too important not to get the best advice.



➤ SUZANNE changed her address and forgot to notify the Transport Department so that the renewal of her registration of her vehicle was not received by her. She did not notice that it had expired until an accident occurred causing injury to three passengers in the other vehicle. It was not all Suzanne's fault but the court decided that she was 50% at fault and therefore responsible for paying extensive damages. Because she had no registration she had no third party personal injury insurance.

Although the Nominal Defendant, the Government body which acts as the insurer for unregistered vehicles paid the claimant, Suzanne had to reimburse the Nominal Defendant. At the end of the day she had to sell almost everything she owned to pay for the claim.

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### Take the first step...

Find out what the specific risks and dangers are for you, what you can do about it and how much it will cost. Once you have that information you can decide what to do.

Start today by calling us to make an appointment on 1300 625 297 - then complete the questionnaire. Then you can relax - knowing you have done everything you can to protect your business, wealth and family.

## Asset Protection Questionnaire

To advise you properly we need to know how your business is owned and operated and gain an appreciation of the value of your assets and liabilities.

If you are uncertain about any of the information just leave the question unanswered as we can always get the information from your accountant or financial planner.

If there is insufficient room just attach another page or use the blank page at the end.

### Personal Details

Name:

Date of Birth:

Mobile:

Address:

Home Tel:

Fax:

Email Address:

### Business Details

Business Name:

Address:

Business Tel:

Fax:

Email Address:

### Your Accountant Details

Name:

Contact Tel:

### Your Financial Planner Details

Name:

Contact Tel:

What is your Business, Trade or Profession? *Please provide a brief description*





**Description of any licenses used in the business** *(such as BSA or ESO Licences)*

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**Description of Investment Structures** *(if the above documents are not given to us)*

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**Non-Business Assets and Liabilities**

Please list your assets and liabilities with a general indication of the value of each asset and the extent of any liability. Only approximate figures are required.

**HOME**

Address:

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Who owns the home?

If joint ownership indicate if it is owned:

as joint tenants or  tenants in common

Approx Value: \$

Approx Debt: \$

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**REAL ESTATE INVESTMENT** *Please provide details of any other real estate owned*

Address No 1:

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Nature of the Property: (i.e. beach house or investment purposes)

Current Value: \$

Liabilities secured by mortgages over property: \$

Owner's Name/s:

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If joint ownership indicate if it is owned:

as joint tenants or  tenants in common

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Address No 2:

Nature of the Property: (i.e. beach house or investment purposes)

Current Value: \$

Liabilities secured by mortgage over property: \$

Owner's Name/s:

If joint ownership indicate if it is owned:

as joint tenants or  tenants in common

Address No 3:

Nature of the Property: (i.e. beach house or investment purposes)

Current Value: \$

Liabilities secured by mortgage over property: \$

Owner's Name/s:

If joint ownership indicate if it is owned:

as joint tenants or  tenants in common

## SHARE PORTFOLIO

Do you hold shares/units/options etc in companies listed on the stock exchange or interest in any managed fund and what is their approximate value? Please indicate any debts that are owed in relation to the portfolio. Only a very general overview of your investments is needed.

Description:

Approx Value: \$

Approx Debt: \$

Description:

Approx Value: \$

Approx Debt: \$

Description:

Approx Value: \$

Approx Debt: \$

Description:

Approx Value: \$

Approx Debt: \$

Description:

Approx Value: \$

Approx Debt: \$

## FINANCIAL INVESTMENTS

Do you have any investments with a bank, building society, credit union or other financial institution and in whose name are the investments?

Description:

Owner's Name/s:

If joint ownership indicate if it is owned:

as joint tenants or  tenants in common

Approx Value: \$                      Approx Debt:

Description:

Owner's Name/s:

If joint ownership indicate if it is owned:

as joint tenants or  tenants in common

Approx Value: \$                      Approx Debt:

Description:

Owner's Name/s:

If joint ownership indicate if it is owned:

as joint tenants or  tenants in common

Approx Value: \$                      Approx Debt:

Description:

Owner's Name/s:

If joint ownership indicate if it is owned:

as joint tenants or  tenants in common

Approx Value: \$                      Approx Debt:

## LIFE INSURANCE

What life insurance policies do you have? Include any policies over the lives of others (such as your spouse) which are owned by you.

Description:

Name of Insurer:

Policy Owner/s: (i.e. to who the monies will be paid on your death)

Level of Cover: \$

Description:

Name of Insurer:

Policy Owner/s: (i.e. to who the monies will be paid on your death)

Level of Cover: \$

Description:

Name of Insurer:

Policy Owner/s: (i.e. to who the monies will be paid on your death)

Level of Cover: \$

Description:

Name of Insurer:

Policy Owner/s: (i.e. to who the monies will be paid on your death)

Level of Cover: \$

## **SUPERANNUATION**

What are the details of your superannuation fund (if any) and possible entitlement? Please indicate if there is a life policy attached to the fund and the level of cover. If so - how much?

If it is a self managed superannuation fund, who are the trustees and if you have a copy of the deed readily available please supply a copy.

## **LIABILITIES**

Do you have any other debts such as personal loans not described above?











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