

# irongroup lawyers



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## Asset Protection: Exposure & Solutions

### Background

Litigation is a word that strikes fear into the heart of many people. The thought of losing everything you have worked for is rather daunting.

There is also a growing realization that professional indemnity and public liability cover does not provide a catch-all. The amount of cover may seem high (as can the premiums) but there is no guarantee it will be enough to cover damages let alone the legal costs.

For some people, business insolvency, perhaps as a result of an economic downturn and related cashflow problems, will be more of a driver.

Regardless of the cause, hard-earned assets can be exposed in unexpected ways. We identify some of the more common problems and strategies to deal with them in case you have clients whose assets are exposed, or perhaps are concerned about your own.

### But first - what is the government's attitude towards asset protection?

Unlike tax avoidance, the government recognises a business owner's right to protect their assets from bankruptcy. When announcing recent amendments to the proposed Bankruptcy Act legislation, Attorney General Philip Ruddock said "care had been taken to ensure the amendments recognised the legitimacy of asset protection arrangements and freedom to arrange financial affairs as seen fit by people when they are not insolvent or about to become insolvent."

### Helping to identify business exposure

Could the business be sued for product defects? Are they providing professional advice that could be considered negligent? Or perhaps they should have been proactive in providing advice but weren't. Is professional indemnity or public liability cover in place and what is the limit? Is this enough? Don't forget to allow for the legal costs.

Is the business vulnerable to a downturn? Perhaps demand is declining or they are reliant on a couple of large clients.

### Helping to identify personal exposure

Is the client a director of the company? Is their spouse a Manager? Both can be held responsible if they allowed the company to continue to trade while insolvent with the result that their personal assets could be exposed.

Have they borrowed from the company? If the business goes into liquidation, any unsecured loans can be called up including those to shareholders or directors.

Some clients may have transferred money into a family trust. However under current legislation these transactions can be "clawed-back" for up to 5 years. In addition, there are further changes proposed to the Bankruptcy Act that would increase the time limit for recovering 'under-market value' transfers to related parties.

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phone: 03 8621 9000

email: [info@irongroup.com](mailto:info@irongroup.com)

Irongroup Pty Ltd

ACN 102 794 249

fax: 03 8621 9001

web: [www.irongroup.com](http://www.irongroup.com)

Level 4, 45 William Street Melbourne VIC 3000

# Asset Protection: Exposure & Solutions

## Some protective strategies

### 1. Protecting past profits

**Exposure:** If the trading entity is a company, profits are sometimes not declared as dividends because the company requires the capital for growth. The retained earnings are represented in the assets which are owned by the company. These assets become available to a liquidator.

**Solution:** Have the company pay the dividend and have the shareholders loan the dividend amount to the company via a Debenture Mortgage. The shareholders become secured creditors.

**Exposure:** If the trading entity is a discretionary trust, the profits are usually distributed to a beneficiary company for tax reasons but the distributions are often unpaid due to capital requirements. The trustee retains the profits which are then exposed to a liquidator.

**Solution:** Have the trustee pay the distribution and have the beneficiary company then loan the distribution amount (or part thereof) back to the trustee as a secured loan via a Debenture Mortgage.

### 2. Intellectual property and goodwill

**Exposure:** Often trading entities own their own brand names and Intellectual Property (IP). But if the company is liquidated, the ability to trade under that brand and use the IP is lost.

**Solution:** The brand name and IP should be owned by a 'safe' entity and licensed back to the trading entity for use. If the business goes into liquidation, they can be re-licensed to another entity.

### 3. Personal guarantees - working capital

**Exposure:** It is common for trading companies to have an overdraft or loan for working capital. These are often secured by personal assets e.g. a Director's home.

**Solution:** Grant a Debenture Mortgage in favour of the creditor who has received such security or even personal guarantees.

The Debenture Mortgage makes those creditors "priority creditors" - first in the queue for full payment from the company, and so less likely to need to recover from the owner personally.

### 4. Sole Directors

**Exposure:** The corporations law exposes Directors,

Secretary and Managers of companies to personal liability for the debts of the company during a period of insolvent trading.

**Solution:** Amend all company directorships to "sole director" where possible.

### 5. Assets held in the name of exposed person

**Exposure:** All non-secured assets owned in a personal name are available to a bankruptcy trustee.

**Solution One:** Where possible, assets should be purchased in the name of a non-exposed person or entity, or transferred to one as soon as possible e.g. transfer the family home to a spouse who cannot be sued or is not liable for insolvency.

This of course, may not always be practical eg the exposed person may be single, or perhaps both partners are in the business & exposed. In these cases, a discretionary trust can own the assets, with the business person (and spouse if applicable) as appointors of the trust. However, although this may be helpful with new acquisitions, stamp duty and CGT can act as a deterrent to asset transfers. As may the proposed claw-back changes mentioned above.

**Solution Two:** Irongroup has developed a package that allows you to secure exposed assets to a "friendly creditor".

This protects current assets without changing ownership so there are no CGT nor stamp duty implications. It can also be used to protect any new assets acquired & future increases in value.

It also allows high income earners to take advantage of negative gearing without exposing the investment to bankruptcy.

**A Complete Solution:** This strategy can be used to protect both personal and business assets. Only one package is required and can be used to secure assets held in multiple names. If you would like more information on this exclusive Irongroup package please contact us for a confidential discussion.

### Can Irongroup help?

If you would like a copy of the Irongroup Asset Protection Checklist please email us on [info@irongroup.com](mailto:info@irongroup.com).

Or for more information on Irongroup's Asset Protection Strategies please call us on 03 8621 9000.