# 7 THINGS you need to know about ASSET PROTECTION

## 1. What is asset protection?

Asset protection involves planning to protect assets from potential future financial setbacks such as creditor claims, business failure and family disagreements. It is a risk management strategy, designed to provide individuals with a degree of protection.

There are no foolproof ways to protect assets but there are structures that can be used to reduce risk. Strategies used will depend on an individual's financial situation, exposure to risk etc. The most popular asset protection strategies include using trusts, superannuation and binding financial agreements as well as holding significant assets in a low-risk spouse's name.

PENDERS
Making Numbers Count

## 2. Why use asset protection strategies?

Using asset protection strategies is a proactive rather than reactive way to reduce an individual's risk of liability. Building wealth is achieved over a lifetime of hard work and without careful financial planning, you could lose it all. This could seriously jeopardise your plans for retirement.

Asset protection serves as a legal process of protecting one's assets from third-party claims and creditors. Asset protection can significantly minimise the risks of creditors making claims to your assets, thus insulating your business and other personal assets.

Protecting assets is recommended for individuals in high risk positions, who are more likely than the average person to come under scrutiny from creditors, such as investors, CEOs, company directors, professionals in high risk industries i.e, medical, financial and legal, business owners and entities with accumulated wealth.

Asset protection acts as a buffer; putting distance between you and your assets, thus making it harder for creditors to make claim to. Unfortunately, creditors and third party claims may not be the only risk to your assets. It is not uncommon, for example, for families to suffer breakdowns and large lawsuits due to one or more family members challenging their entitlement to wealth accumulated by their parents. Adopting strong asset protection strategies can help prevent this from occurring.



SUITE 4, LEVEL 1
474-478 NEPEAN HIGHWAY
FRANKSTON VIC 3199

**TEL** (03) 9783 2200
**FAX** (03) 9783 2900

**EMAIL**
admin@penders.com.au

DIRECTOR
Thomas Pender

Accounting
Tax Returns & Advice
Business Planning & Advice
GST Returns & Advice
Company Secretarial

# 3. Superannuation

Using superannuation as an asset protection strategy is effective as it can provide statutory protection from creditors (provided it is a regulated fund). Establishing a regular pattern of super contributions and maximising concessional contributions can minimise assets exposed to creditor claims.

Those with an SMSF can protect fund assets from creditor disputes by recording them in a way that distinguishes them from your personal or business assets and clearly shows legal ownership by the fund. A corporate trustee structure also helps to protect assets in the case the trustee is sued for damages as companies have limited liability.

Be aware that 'out of character' transactions such as contributions to a super fund prior to bankruptcy and money withdrawn from the fund before bankruptcy may subject super to creditors.

# 4. Moving assets to a discretionary trust

Consider using a discretionary trust to hold assets. A discretionary trust provides the trustee with discretion to determine the amount of money that will be paid to each beneficiary of the trust. One of the major benefits of using a discretionary trust is that the beneficiaries do not own or have an interest in the property held in the trust and therefore the trust assets are generally not at risk if a beneficiary is attacked by creditors.

To further increase protection, high-risk individuals should not be an appointer of the trust, a default beneficiary, director of the corporate trustee and should not hold shares in the corporate trustee (or only hold a small percentage). Additionally, unpaid trust distributions, loans or gifts to a trust should be kept to a minimum as they are all exposed to creditors' claims.

# 5. Protecting the family home

Losing the family home can be devastating. Luckily there are strategies to employ that will prevent this from happening. One of these strategies is to purchase the home in the name of the lower-risk spouse.

This strategy is particularly useful in families where one spouse is involved in high-risk finances, such as a company director, business owner, investor of property or shares. In certain situations, creditors can access the personal assets of the director or trustee if the structure has a deficit of assets to pay its debt. Protecting the family home by holding it in the name of the low-risk spouse is only effective if they have not guaranteed any loans of the business.

Another benefit is that in the case of a separation or divorce, the home is considered common property and both parties are entitled to the home, regardless of whose name the property is in.

# 6. Set up a testamentary trust

Asset protection does not only apply while living - you can protect future generations. A testamentary trust under a Will is one way of protecting beneficiaries. Testamentary trusts provide greater flexibility to the trustee in distributing the capital and income between beneficiaries and protects against claims on the beneficiary's assets. As none of the assets are legally owned by beneficiaries, it may protect the assets of the trust in circumstances such as divorce of a beneficiary, from creditors of a beneficiary and Will challenges. It is beneficial for high risk beneficiaries that work in professions where negligence claims are likely and for beneficiaries that intend to receive a social security entitlement (e.g. pension or disability support pension) which may affect eligibility if they receive a lump sum inheritance.

When is a Will is challenged, the courts often look to other sources of evidence to support the Will. Keeping a diary that documents events, photographs, etc. adds legitimacy to a Will if contested.

# 7. Binding financial agreements

Binding financial agreements (BFAs) are important for those entering into a partnership; such as a de facto relationship or marriage. They are ideal for protecting the assets parties own should the partnership go awry. BFAs are available to anyone, regardless of if you are in a heterosexual or same-sex relationship, and whether you are already married, separated or divorced.

Various types of binding financial agreements include Pre Nuptial Agreements, Post Nuptial Agreements, Cohabitation Agreements, Divorce Agreements and Separation Agreements.

While the various types of binding financial agreements all differ, they all set out who owns which assets and who is entitled to them if and when the two parties exit the relationship. They do not need to be signed or approved by a court, but rather just the involved parties and their lawyers.