

## Key Business Assets

Asset protection may be achieved by separation of business assets from trading activities

### Business & Business Goodwill

Separation of assets may include franchising or licensing intellectual property, eg trade marks

Retained Profits

Trade Marks

Business Premises

Other Intellectual Property eg Copyrights & Designs

### **Asset Protection and Intellectual Property**

While business goodwill is usually entwined with a trading entity, it can be turned into a separate entity by the creation of intellectual property such as copyrights and registered trade marks and designs. There is not necessarily a parallel, however, between the ability to develop intellectual property and the business acumen to financially exploit that intellectual property. There have been countless instances of where the beneficiaries of a new idea or process are the people or organisations that are able to gain control of the associated intellectual property after a financial setback for the person who came up with the idea or process in the process.

### **Separation of Key Assets from Trading Entity**

One way to reduce the likelihood of this happening is to structure the ownership of the intellectual property (and other key business assets, including retained profits and premises) so that those assets are owned separately from the trading business and its general business goodwill. For example a trustee of a family or hybrid trust may own business premises or intellectual property and then a written agreement with a trading entity is entered into to rent or the assets to the trading entity – see the *Intra Business Agreements Pocket Summary*.

Where a purely corporate structure is used the intellectual property might be owned in a holding company, rather than in a trading company, although company ownership precludes the 50% CGT discount under Division 115 of *ITAA 1997*.

### **Small Business CGT Concessions – Maintaining Connection**

Where eligibility for the small business CGT concessions in Division 152 of *ITAA 1997* are a possibility (as is frequently the case for many owner controlled businesses), care is needed to ensure that any separately owned asset such as premises or trade marks remains “connected” with the trading entity for CGT purposes – see section 152-30 of *ITAA 1997* and the *Small Business CGT Concessions Pocket Summary*.

## Ownership Options for Non-trading Assets

- Holding company
- Family (fully discretionary) trust
- Company beneficiary of family trust
- Personal ownership – ungeared
- Personal ownership – geared, eg to family trust
- SMSF (business premises)

Lease, licence,  
loan or service  
agreement  
with business

### **Ownership Options for Non-trading Assets**

A fundamental aspect of protecting business assets from the risk of being in business is to hold the non-trading assets of the business separately from the trading assets. Key ownership alternatives for the non-trading assets of an Australian business are:

- A holding company that owns the shares in the trading company. A company does not qualify for the general 50% CGT discount, but is able to provide secured and unsecured loans to the trading company without triggering a deemed dividend and the income of the holding company can be retained at a flat income tax rate of 30%. The ownership of the shares in the holding company is particularly important in determining both asset protection and eligibility for the small business CGT concessions (see the **Small Business CGT Concessions** Pocket Summary).
- A family trust with its non-personal ownership. A family trust qualifies for the general 50% CGT discount and offers flexibility in terms of distributions of income each year, but needs to distribute to a company beneficiary to have access to the flat income tax rate of 30%. As with holding companies, the ownership of company beneficiaries is crucial. In NSW, Victoria, Queensland and ACT there are higher rates of land tax on non-farming real estate owned in family trusts.
- The asset protection risk of personal ownership is reduced by the extent to which an asset is geared, either to a 3<sup>rd</sup> party or to the trustee of a family trust, or when the ownership is by a domestic partner who is not subject to the business risk.
- The investment restrictions applicable to self managed superannuation Funds (“SMSFs”) mean that business premises are usually the only business assets owned in an SMSF, whether purchased outright or with approved borrowing (see the **Instalment Warrants for SMSFs** Pocket Summary).

See also the **Intra Business Agreements** Pocket Summary.

## Key Business Assets – Further Reading

**Australian Master Estate  
Planning & Succession  
Guide – Chapter 12**

**You Can't Take It  
With You –  
Chapter 18**

**The latest version of this Pocket Summary is at  
[www.mooreslegal.com.au/services/epss/pocket-summaries](http://www.mooreslegal.com.au/services/epss/pocket-summaries)**

All of the Pocket Summaries are copyright. They are for training, educational and general information purposes only and should not be relied on as (or in substitution for) legal, accounting, financial or other professional advice.

### **Further Reading**

- The 1<sup>st</sup> edition of the ***Australian Master Estate Planning and Succession Guide*** by Allan Swan is scheduled to be published by **CCH** in 2011.
- The 1<sup>st</sup> edition of ***You Can't Take It With You*** by Andrew Simpson was published by **Wrightbooks** in 2009.
- The 5<sup>th</sup> edition of ***Tax Issues in Family Law Property Settlements*** – The Difference Between Hacking and Carving by Peter Szabo was published by **MOORESLEGAL** in 2008.

### **About the Author of the Pocket Summaries – Allan Swan**

In addition to his main role as a principal of the **MOORESLEGAL** estate planning team (working in the areas of **Asset Protection, Trusts, Superannuation, Tax and Estate Planning**) Allan is also the principal of **APTSTEP**, a provider of training and materials. Allan's current presentation topics are:

- Asset Protection Planning (includes pages 1-2 of this Pocket Summary)
- Blended Families
- Business Structures Overview (1-2)
- Estate Planning – Key Cases and Rulings
- Estate Planning – Practical Case Studies for 2010
- Estate Planning – Tax and Strategic Issues
- Funding Estate Planning
- Ruling from the Grave
- SMSFs – Planning Issues
- Superannuation Death Benefits
- Superannuation Overview
- Testamentary Trusts
- Trusts – Income and Capital Distributions
- Trusts – The A-Z (1-2).

Contact Allan 03 9843 2153 for further information regarding on the content of the topics, the fees charged and to schedule a presentation, workshop or seminar.