

# Asset Protection Strategies

16 February 2016





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embodies the passion  
and entrepreneurial  
spirit of our clients.**



**Sladen  
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# **Introduction**

Presented by Phil Broderick

16 February 2016



# Protecting distributions, gifts and loans including the use of gift and loan arrangements

Presented by Rob Jeremiah

16 February 2016



**Rob Jeremiah**  
**Principal**  
**Sladen Legal**

[rjeremiah@sladen.com.au](mailto:rjeremiah@sladen.com.au)

03 9611 0103

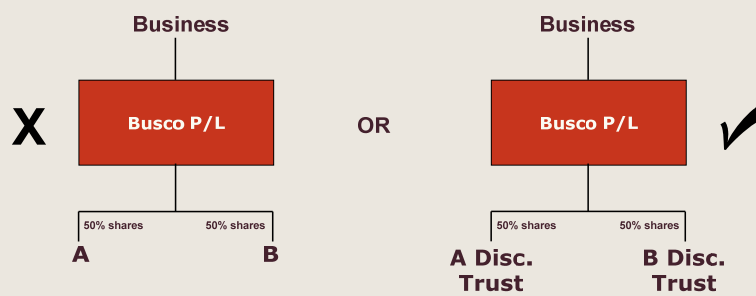
[sladen.com.au](http://sladen.com.au)

[in au.linkedin.com/in/robjeremiah](https://www.linkedin.com/in/robjeremiah)

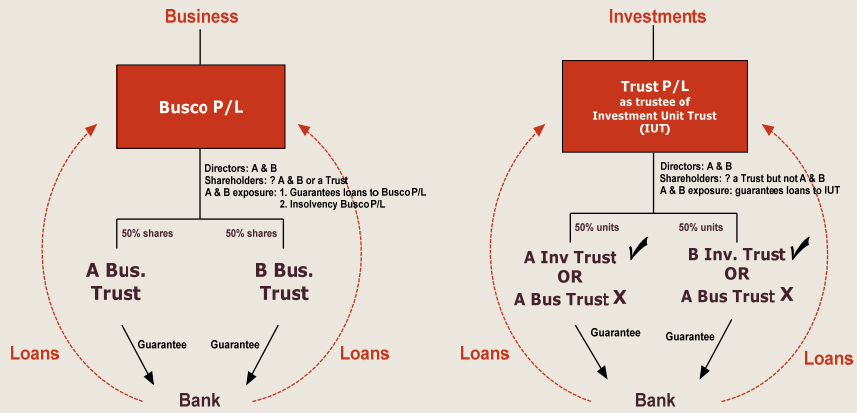


## Risk exposures

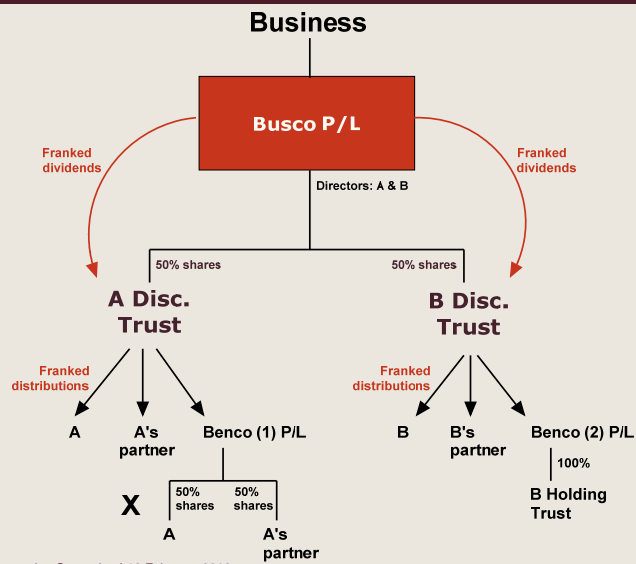
1. Guarantees by - individuals  
- entities
2. Directorships
3. Relationships - personal  
- business (e.g. partnerships)
4. Asset ownership



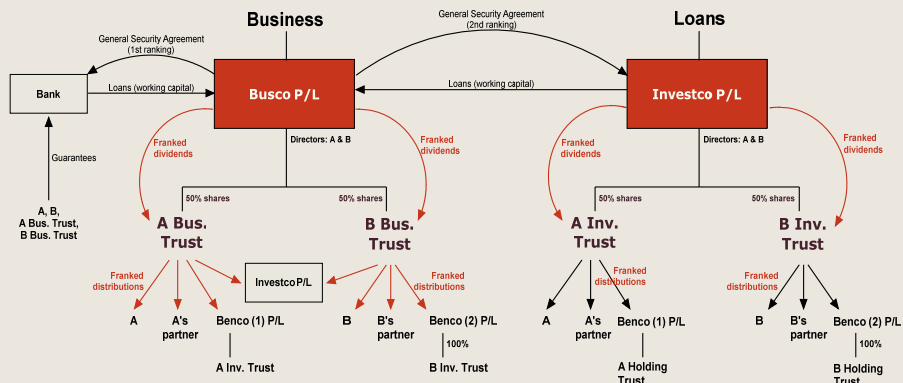
### Structure and ownership of assets (cont.)



### Structuring of distributions from companies and trusts



## Structuring of distributions from companies and trusts (cont.)



## Structuring of distributions from companies and trusts (cont.)

### Exposures of:

#### 1. Distributions paid to individuals:

On relationship breakdown exposure of entity to claim for support provided

#### 2. Distributions unpaid (UPEs or unpaid dividends) exposures:

2.1. On relationship breakdown UPEs are assets for family law property settlement

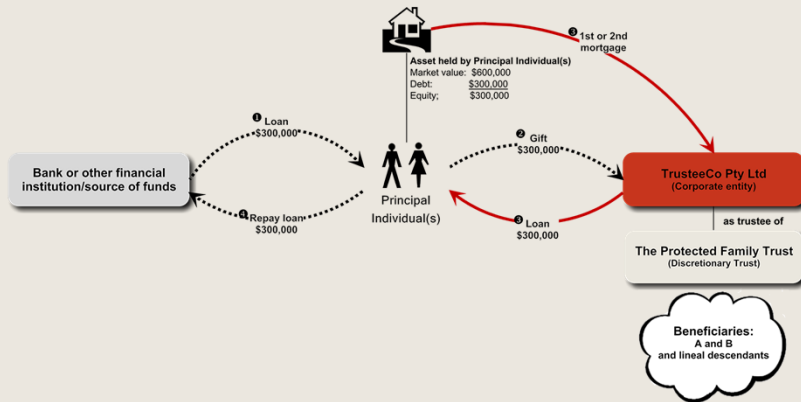
2.2. On personal or corporate insolvency UPEs are assets:

2.2.1. exposed to guarantees

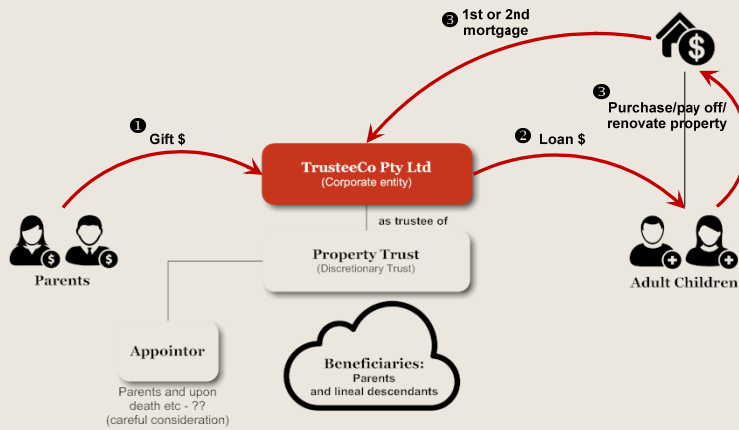
2.2.2. directorship insolvency claims

#### 3. Distributions to companies in which shares owned by individuals exposure to risks to which individuals are exposed

## Gift loan and mortgage arrangement



## Gift loan and mortgage arrangement (cont.)



1. Issues

- 1.1. Is restructuring for asset protection or tax:  
ATO view tax unless clear demonstration  
of risks from which protection sought
  
- 1.2. Tax on restructuring:
  - CGT – but small business concessions may apply
  - Duty

2. Purpose and effectiveness

- 2.1. Tax – Part IVA
- 2.2. Relationship breakdown
- 2.3. Insolvency – clawback period/purpose

- 3. If structure considered and implemented prior to  
commencement of business / investment none of  
restructuring issues relevant



# Super contributions and asset protection – including the bankruptcy clawback rules

Presented by Phil Broderick

16 February 2016



**Phil Broderick**  
**Principal**  
**Sladen Legal**

**[pbroderick@sladen.com.au](mailto:pbroderick@sladen.com.au)**

**03 9611 0163**

**[sladen.com.au](http://sladen.com.au)**

**[@sladensuper](https://twitter.com/sladensuper)**

**[au.linkedin.com/in/philipbroderick](https://au.linkedin.com/in/philipbroderick)**



## **Protection from member's creditors**

- Contributions
- Members benefits in the SMSF
- Benefits paid out of the SMSF
- Death benefits

- This presentation will examine asset protection for members from creditor risks
- Will not review:
  - Protecting member benefits from family law risks
  - Protecting SMSFs from creditor risks
  - Claims in relation to death benefits

## Contributions - Protection from member's creditors

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- Broadly 2 ways in which member contributions can be clawed back:
  - Bankruptcy Act
  - Common law/equity

## Contributions – Bankruptcy Act

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- The Bankruptcy Act has a number of provisions under which super contributions could be clawed back, including:
  - Section 58 – property of the bankrupt
  - Section 120 – transfers made for no or under market value consideration
  - Section 121 – transfers with the purpose of defeating creditors
  - Section 128B – super contributions made to defeat creditors
  - Section 128C – contributions made by third persons for the purpose of defeating creditors

#### Contributions – Bankruptcy Act (Cont')

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- Section 58 – property of the bankrupt
- Property of the bankrupt vests in the trustee in bankruptcy at the commencement of bankruptcy
- This is before the appointment of the trustee in bankruptcy
- Therefore the bankrupt will control his/her assets for a period before the trustee is appointed
- Contributions by the member during this time are invalid and will be clawed back
  - Eg - Official Trustee in *Bankruptcy v Trevor Newton Small Superannuation Fund Pty Ltd (Small)*
  - Bankruptcy commenced 14 March 1997
  - Mr Small made a contribution on 23 July 1997
  - The trustee was able to claw this contribution back as the money used to make the contribution had vested in the trustee

#### Contributions – Bankruptcy Act (Cont')

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- Section 120 – transfers made for no or under market value consideration
- Allows claw back of transfers of property (including super contributions) where the transferee paid **no consideration or less than market value consideration** in the following timeframes:
  - If the bankrupt was solvent at the time of the transfer (contribution):
    - 2 years from the commencement of bankruptcy if the transfer is to an unrelated party
    - 4 years from the commencement of bankruptcy if the transfer is to a related party
  - If the bankrupt was not solvent at the time of the transfer – 5 years

#### Contributions – Bankruptcy Act (Cont')

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- Section 120 – transfers made for no or under market value consideration
- The High Court decision of *Cook v Benson* arguably made it impossible to use s120 in a super contribution context
  - Found that super contributions were made for valuable consideration
- This resulted in the introduction of sections 128B and 128C (discussed below)
- However, obiter in *Australasian Annuities Pty Ltd v Rowley Super Fund Pty Ltd (Rowley Super)* suggests s120 could apply to SMSFs
  - Neave JA distinguished *Cook v Benson* in an SMSF context
  - It would be 'artificial in the extreme' to treat an SMSF as a purchaser for valuable consideration when it received a contribution from a related trust

#### Contributions – Bankruptcy Act (Cont')

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- Section 121 of the Bankruptcy Act allows a trustee in bankruptcy to claw back transfers of property where the transferor's main purpose in making the transfer was:
  - to prevent the transferred property from becoming divisible among the transferor's creditors; or
  - to hinder or delay the process of making property available for division among the transferor's creditors
- The main purpose will be deemed to defeat creditors if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent
- No time limit under section 121
  - Eg - Cummins Case

- Important exception in s121(4) where the following criteria are met:
  - consideration from transferee at least as valuable as the market value of the property; and
  - the transferee did not know, and could not reasonably have inferred, that the transferor's main purpose in making the transfer was one of the two above purposes; and
  - the transferee could not reasonably have inferred that, at the time of the transfer, the transferor was, or was about to become, insolvent
- Again - *Cook v Benson* made it difficult to apply s120 for contributions to non-SMSF funds
- Still could apply to SMSFs given likely to be knowledge or inferred knowledge
  - Eg - Small's case – SMSF with member and accountant as directors – found to have knowledge of purpose

- Section 128B of the Bankruptcy Act allows a trustee in bankruptcy to claw back transfers to super funds after 28 July 2006 where the transferor's main purpose in making the transfer was:
  - to prevent the transferred property from becoming divisible among the transferor's creditors; or
  - to hinder or delay the process of making property available for division among the transferor's creditors
- Like section 121 the transferor's main purpose will be deemed if can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent

- Above provisions of 128B are similar to section 121
- However section 128B contains 128B(3), which compels the following additional considerations when determining the main purpose:
  - (3) In determining whether the transferor's main purpose in making the transfer was the purpose described in paragraph (1)(c), regard must be had to:
    - (a) whether, during any period ending before the transfer, the transferor had established a pattern of making contributions to one or more eligible superannuation plans; and
    - (b) if so, whether the transfer, when considered in the light of that pattern, is out of character
- This raises the questions:
  - What is a pattern of making super contributions?
  - What is out of character?

- Another difference to s121 is that there is no equivalent to s121(4) in s128B
  - therefore no defence that transferee super fund gave market value consideration
- Section 128B(5) creates a rebuttable presumption of insolvency at the time of the transfer if it is established that the transferor:
  - had not, in respect of that time, kept such books, accounts and records as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor's business transactions and financial position; or
  - having kept such books, accounts and records, has not preserved them

- Given the application of s128B is there any room to apply s120 and s121?
  - Section 120 would appear difficult to apply given the *Cook v Benson* view that super funds give valuable consideration for super contributions
    - However – note obiter of Neave JA in *Rowley Super* that their may not be valuable consideration for SMSFs
  - Section 121 unlikely to apply for transfers to super funds but could still apply for under market value transfers to trusts and companies that an SMSF controls or is invested in

- Section 128C – contributions made by third persons for the purpose of defeating creditors
- deals with contributions made by third persons for the purpose of defeating creditors
- largely mirrors section 128B except it requires a scheme of which the bankrupt was a party and that the bankrupt's purpose for entering into the scheme was for the purpose of defeating creditors
- possible examples
  - an employee asking that all of his/her salary is salary sacrificed into super should before he/she become bankrupt
  - a bankrupt directing that his/her salary be paid as contributions to his/her spouse
  - a bankrupt requesting that in lieu of being paid for services super contributions be made instead



## Contributions – Common law/equity

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- There are various methods under common law and equity under which a Court can claw back monies from a person
- An example includes amounts received by a person with “knowing receipt” that the monies were paid as a result of a person’s breach of their fiduciary duties
- Eg - Rowley Super
  - Mr Rowley was found to be the controlling mind of both the trustee of a discretionary trust and the corporate trustee of his SMSF
  - When Mr Rowley breached his fiduciary duties to the corporate trustee of the discretionary trust by taking large amounts out of the trust in order to make contributions to his SMSF the corporate trustee of his SMSF was found to have “knowing receipt”
  - As a consequence the SMSF was forced to return the contributions to the corporate trustee (by then in liquidation) for knowingly receiving trust property as a result of a director breaching his fiduciary duties

## Benefits in the SMSF

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- Bankruptcy Act
  - Generally protected as super benefits not divisible property and therefore can’t be claimed by trustee in bankruptcy - s116(2)(d)(iii)
  - However does not protect contributions if clawed back under ss 120, 121, 128B or 128C apply
- SIS Regs
  - Reg 13.13 also provides some protection as trustees must not recognise, or in any way encourage or sanction, a charge over, or in relation to a member's benefits
  - However such charges not void
  - Rather SMSF trustee subject to penalties and sanctions

## Benefits paid out of an SMSF

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- Lump sums paid after bankruptcy protected - s116(2)(d)(iv) Bankruptcy Act
- What not protected:
  - Pension payments – added to income calculation (half paid to the trustee in bankruptcy)
  - Benefits received before bankruptcy
- Therefore consideration should be given to:
  - Paying lump sums to bankrupts
  - Commuting pensions into accumulation accounts or as lump sums
  - Keeping benefits in super
  - Not paying benefits before bankruptcy

## Death Benefits

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- Same rules apply to benefits paid to members
- For section 128C the pattern of contribution test does not need to be considered – s128C(5)
- Consideration for the payments of death benefits to bankrupts:
  - Pay death benefits in the form of lump sums
  - Pay death benefits to the estate where they are payable to discretionary testamentary trusts or super proceeds trusts

# Secured intra-family group loans and the Family Court

Presented by Daniel Smedley

16 February 2016

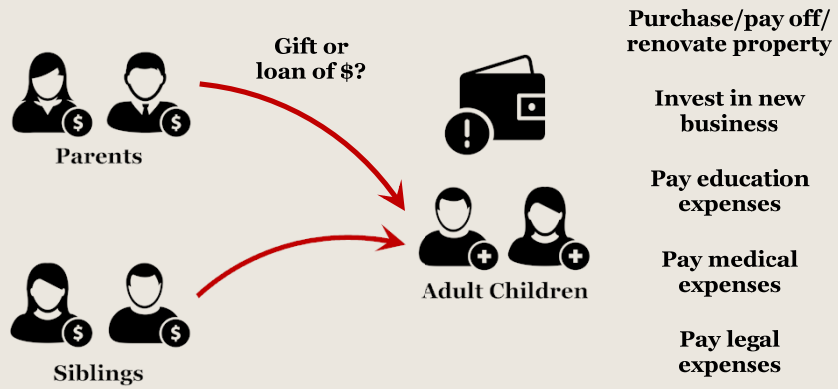


**Daniel Smedley**  
**Principal**  
**Sladen Legal**

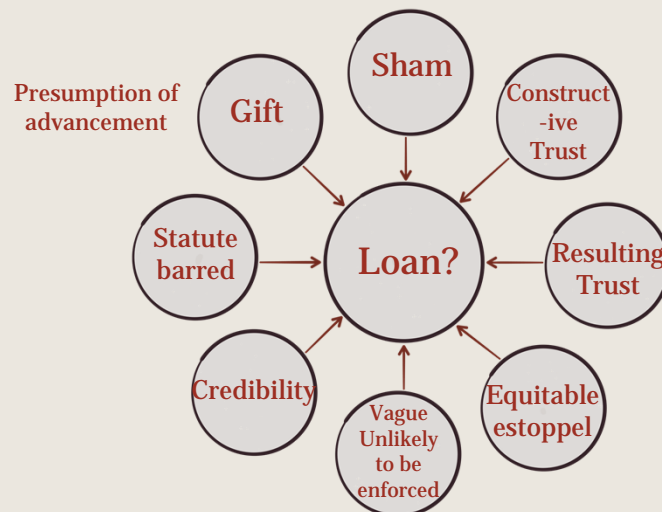
[dsmmedley@sladen.com.au](mailto:dsmmedley@sladen.com.au)  
03 9611 0105  
[sladen.com.au](http://sladen.com.au)  
[au.linkedin.com/in/danielsmedley](https://au.linkedin.com/in/danielsmedley)



Intra-family loans



Challenges to the loan



Recent cases

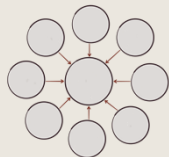
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## Cases

- *Vadisanis & Vadisanis and Anor* [2014] FamCAFC 97
- *Winston & Winston (No. 2)* [2013] FamCAFC 147
  
- *Af Petersens and Af Petersens* (1981) FLC 91-095
- *Biltoft and Biltoft* [1995] FamCA 45
- *Damiani & Damiani* [2012] FamCA 535

What steps should be taken?

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- Formal loan agreement
- Term
- Interest
- Commercial terms
- Registered security
- Maintain live/freshen up loan
- Behaviour/discussions

Other issues to consider

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- Death of the parent – treatment in will
- Death of child before parent
  - What is to happen if the child dies first?
  - Leaving children (grandchildren)? vs Leaving no children (no grandchildren)
- Erosion principle for gifts
- Gift being to the child exclusively vs to child and spouse
- Possibility of parent suing child to recover debt
- Has the loan been “repaid” by a set-off?