



CORPORATE & BUSINESS SERVICES

MACGILLIVRAYS

S O L I C I T O R S

SUPERANNUATION UPDATE

The latest Government statistics regarding our ageing population raise some interesting reminders for all self employed people who either trade as individuals or control companies through their own or their Family Trust's shareholdings.

Often those businesses have been successful in paying monies into Self Managed Super Funds (SMSF).

Every day we hear the question "how much money will I need in my old age and when do I retire?"

Most self employed people sell their business or their interest as their exit strategy and use the funds to top up the SMSF. The monies are then invested or used to generate retirement income.

ISSUES TO CONSIDER IN SELLING THE BUSINESS

1. How easy will it be to sell my business and/or my interest in it?
2. Where will the legal ownership structure require you to send the sale proceeds?

INDIVIDUAL OWNING BUSINESS

To sell the business owned as an individual is not a complicated exercise and should not be a detriment to a purchaser if it is owned by individuals simplistically. It may be an issue for the seller re their tax affairs.

All the proceeds of sale will be the property of the seller and will simply become their assets subject to what can be paid into the SMSF at that time. Retirement in the appropriate circumstances, entitles the retiree to draw on the SMSF without tax consequences.

However, this structure does not give the seller much scope for asset control in the long term.

FAMILY TRUST OWNING THE BUSINESS

Most prudent business owners - no matter how they control the business - will have set up Family Trusts and SMSF long before they sell.

There are a multitude of scenarios available and each case may be different from another; no structure fits all.

What is relevant is that current government statistics show that all business owners should revisit their structures to ensure ease of sale and sensible distribution of proceeds to assist them in retirement. If the structure is too convoluted the purchaser may shy away.

A prudent purchaser is recommended to not buy shares in a "family company" as a way to obtain the business unless substantial due diligence is completed. A potential risk is an unknown claim after the sale. Ownership of the shares and the change in control of the company could decrease its value by increasing liabilities.

Hence it is better not to buy the shares in a business owned under a Family Trust structure.

However, if there are a number of structures e.g. Unit Trusts and Family Trusts holding assets and/or passive non trading entities holding assets being used by way of licence in the business, it may be advantageous for a purchaser to buy shares or units in a non trading arm and the business of the trading arm; not the trading entity.

The purchase price can be split between the appropriate entities and this will be of benefit in both tax planning and estate planning.

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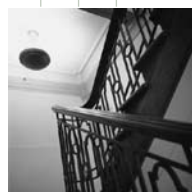
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IINET V ROADSHOW FILMS

(NO 3) [2010] FCA 24

In the recent Federal Court decision of Roadshow Films Pty Ltd v iiNet Limited (No 3) [2010] FCA 24, a total of 34 applicants including Roadshow films, Universal Studios, Paramount Pictures and Disney combined forces to bring proceedings against iiNET, a Perth-based ISP and in turn, brought about a landmark copyright decision.

iiNet had been served with notices by the Australian Federation Against Copyright Theft (AFACT), alleging that iiNet's customers were infringing the copyright of the major film studios – specifically sharing and downloading films and other media via the BitTorrent system. BitTorrent is free 'open source' software that allows the user to easily share video and audio files with other internet users using peer-to-peer networking.

AFACT had requested that iiNet cancel its infringing customers' subscriptions and block certain sites, iiNet refused.

AFACT executive director Adrienne Pecotic said in a statement, "iiNet refused to address this illegal behaviour and did nothing to prevent the continuation of the infringements by the same customers".

The suggestion of copyright infringement via the internet is nothing new, however this was a landmark case as it was the ISP provider accused of the infringement, not the individual offenders. Given the sheer magnitude of online copyright infringement, the latter option would have been a logistical nightmare for the applicants and potentially a public relations disaster.

Targeting iiNet (rather than one of the larger ISPs), is an unusual choice as they have been one of the most proactive ISPs to promote legal access to copyright material and provide an iTunes type service in which to purchase this media.

The court found that iiNet did not authorise infringement of copyright. iiNet's provision of internet services was merely a precondition for copyright infringements to take place and that the copyright infringements occurred directly as a result of the use of the BitTorrent system, not the ISP.

Justice Cowdry commented,

"An ISP such as iiNet provides a legitimate communication facility which is neither intended nor designed to infringe copyright."

The case provides guidance as to the liability of ISPs in respect of copyright infringements by their customers. Had iiNet been held to have authorised infringement, it would have brought the entertainment industry to focus its attack on other ISPs with the effect of many smaller ISPs going under.

However, for now the responsibility lies with the individual, not the ISP when it comes to copyright infringement.

Given the extent of infringement by individuals and the potential loss in revenue for the film industry at stake, it is likely that this is not the end of the matter and an appeal by the studios has been lodged.

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SUPERANNUATION UPDATE

DEATH OF SELLER IN THE BUSINESS

What happens if death ends the joy of the retiree before they are ready?

Did the seller organise their affairs to accommodate the sale proceeds of the main asset to be distributed to their loved ones in their estate in the manner required?

Effective estate planning is very relevant to the seller's intent for the business and needs to be closely linked to the ownership structure and revisited regularly.

Structures that gives flexibility to a self employed are in the main:-

- A. Companies in which shares are owned by Discretionary Family Trusts
- B. Unit Trusts
- C. Partnerships
- D. Individual Sole Trader

The following brief comments are made about each of the above structures:-

A. Companies

- Shareholders are not liable for company debts.
- Any monies paid to Shareholders from profits will be income.
- The Distribution of sale proceeds must go to Shareholders after payment of all debts etc. This will have tax ramifications.
- If the Shareholders are Discretionary Family Trusts there will be opportunities to distribute the monies received to the Trusts beneficiaries and not just to the "Drivers" of the company. However, the distribution can be discretionary so all may not receive funds.

B. Unit Trusts

- The Unit Holders are in the same position as Shareholders except the terms of the Trust Deed control distribution and this will be in accordance with the relevant percentages of the units held.

C. Partners

- The partners receive their respective shares of the partnership as per the agreement or according to the terms of the Partnership Act 1891 (Qld).
- Partners can be Companies, Trusts of all types, and Individuals.

D. Sole Traders

- The Sole Trader will receive the proceeds and the money will be their property.
- What happens to it will depend on their own personal affairs.
- Their Wills control the destiny directly.

If assets remain in Trusts or SMSF, Wills do not have any direct effect on the proceeds. The distribution of the proceeds will be controlled by the rules of the Trust Document and/or the SMSF.

The purpose of this Article is to make us all revisit and reconsider our structures now.

It is far too common to begin business with a simple structure and do nothing about it.

Benefits can be found in each of the above structures if coupled with good Estate Planning.

To ensure your retirement is as you dreamed, look to your Lawyer, Accountant and Financial Planner.



BY JOHN MCGAW