
Trustee troubles

WorkSafe v RH & JY Trust

Presentation by

Sean McIntyre

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Outline of this presentation

Case analysis: *WorkSafe v RH & JY Trust*

Trusts or trustees (collectively) as a “person”

Potential new trustee risks

The prohibition against insurance and indemnities

Insurance / trust considerations

Things to think about



The facts – WorkSafe v RH & JY Trust & ors

- RH and JY Trust is a trading trust that owns a farm and assets on that farm
- Kellisa Farms Limited - Sharemilker operates the farm
- An employee's grandchild is tragically killed after getting caught in machinery
- WorkSafe filed charges
- Section 147 CPA application – is the Trust a “person” and could the Trust be charged?



Relevant definitions - Person

- Includes “*a corporation sole, and a body of persons, whether corporate or unincorporate*”
- Similar wording found in other legislation including the RMA
- Wide definition, includes companies, partnerships as a “person”
- Straightforward for a Trustee to be a “person”
- What is a “body of persons”?

Relevant definitions – PCBU

17 Meaning of PCBU

- (1) In this Act, unless the context otherwise requires, a **person conducting a business or undertaking** or **PCBU**—
 - (a) means a person conducting a business or undertaking—
 - (i) whether the person conducts a business or undertaking alone or with others; and
 - (ii) whether or not the business or undertaking is conducted for profit or gain; but
 - (b) does not include—
 - (i) a person to the extent that the person is employed or engaged solely as a worker in, or as an officer of, the business or undertaking;
 - (ii) a volunteer association;
 - (iii) an occupier of a home to the extent that the occupier employs or engages another person solely to do residential work;
 - (iv) a statutory officer to the extent that the officer is a worker in, or an officer of, the business or undertaking;
 - (v) a person, or class of persons, that is declared by regulations not to be a PCBU for the purposes of this Act or any provision of this Act.

Relevant definitions – Officer

18 Meaning of officer

In this Act, unless the context otherwise requires, **officer**, in relation to a PCBU,—

- (a) means, if the PCBU is—
 - (i) a company, any person occupying the position of a director of the company by whatever name called;
 - (ii) a partnership (other than a limited partnership), any partner;
 - (iii) a limited partnership, any general partner;
 - (iv) a body corporate or an unincorporated body, other than a company, partnership, or limited partnership, any person occupying a position in the body that is comparable with that of a director of a company; and
- (b) includes any other person occupying a position in relation to the business or undertaking that allows the person to exercise significant influence over the management of the business or undertaking (for example, a chief executive); but
- (c) does not include a Minister of the Crown acting in that capacity; and
- (d) to avoid doubt, does not include a person who merely advises or makes recommendations to a person referred to in paragraph (a) or (b).

Relevant definitions – Section 48

48 Offence of failing to comply with duty that exposes individual to risk of death or serious injury or serious illness

- (1) A person commits an offence against this section if—
 - (a) the person has a duty under [subpart 2](#) or [3](#); and
 - (b) the person fails to comply with that duty; and
 - (c) that failure exposes any individual to a risk of death or serious injury or serious illness.
- (2) A person who commits an offence against subsection (1) is liable on conviction,—
 - (a) for an individual who is not a PCBU or an officer of a PCBU, to a fine not exceeding \$150,000;
 - (b) for an individual who is a PCBU or an officer of a PCBU, to a fine not exceeding \$300,000;
 - (c) for any other person, to a fine not exceeding \$1.5 million.



What is a trust?

- An entity in its own right?
 - Not a company, partnership, incorporated society
- A set of obligations?
- A contract?
- A clown car?
- Something else?



District Court decision

- Considered prior case law under different legislation, including the RMA (criminal and civil considerations) and tax legislation.
- Trusts Act 2019
- Identified practical issues, such as who is actually convicted
- Held that the Trust is not a “person” under HSWA
- Ordered that the Trustees could not be charged as a “body of persons” comprising the Trust.
- Liability should be personal to the Trustee

Appeal to the High Court

- WorkSafe appealed “*The question of law for determination is: can a trust (or its trustees collectively) meet the definition of “person” in s 16 of the Act which includes a “body of persons, whether corporate or unincorporate”?*”
- Partially successful: Court agreed Trust not a person, but Trustees are a body of persons
- Trust indemnity – not forbidden despite s 29 HSWA preventing insurance and indemnities

Issue 1: Prohibition on insurance – s 29 HSWA

29 Insurance against fines unlawful

- (1) To the extent that an insurance policy or a contract of insurance indemnifies or purports to indemnify a person for the person's liability to pay a fine or infringement fee under this Act,—
 - (a) the policy or contract is of no effect; and
 - (b) no court or tribunal has jurisdiction to grant relief in respect of the policy or contract, whether under [sections 75 to 82](#) of the Contract and Commercial Law Act 2017 or otherwise.
- (2) A person must not—
 - (a) enter into, or offer to enter into, a policy or contract described in subsection (1); or
 - (b) indemnify, or offer to indemnify, another person for the other person's liability to pay a fine or an infringement fee under this Act; or
 - (c) be indemnified, or agree to be indemnified, by another person for that person's liability to pay a fine or an infringement fee under this Act; or
 - (d) pay to another person, or receive from another person, an indemnity for a fine or an infringement fee under this Act.
- (3) A person who contravenes subsection (2) commits an offence and is liable on conviction,—
 - (a) for an individual, to a fine not exceeding \$50,000;
 - (b) for any other person, to a fine not exceeding \$250,000.



Issue 1: Prohibition on insurance – s 29 HSWA

- Prohibition on contracts of insurance
- Prohibition on other indemnities for HSWA fines or infringements
- Offence to indemnify or be indemnified
- Trust indemnity: good or bad?
- Insurance considerations



Issue 2: Trustees as a “body of persons”

- Who gets charged?
- How do they get charged?
- Who gets convicted and who pays?
- Can the Court consider each member of that “body”?
- Financial capacity, whose?



Issue 2: Trustees as a “body of persons”

- Consideration of beneficiaries
- Should a Trust be a person?
- Should Trustees collectively be a “person”?
- Was this necessary?
- Bigger penalties



Insurance considerations

- Professional trustees
- Claims by beneficiaries
- Cascading duties and obligations – trustee exposure?
- Is there cover for criminal defence costs?
- Limits of liability?



Other things to think about

- WorkSafe's charging decisions
- Should trustees simply make an application to the Court for guidance if charged?
- What if a beneficiary were a victim?
- What if a beneficiary was operating the farm owned by a trust?
- What will the Court of Appeal do?