

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA85/2024  
[2026] NZCA 12**

**BETWEEN**

**RH & JY TRUST  
First Appellant**

**JOCELYN YVETTE BROWN AS  
TRUSTEE OF THE RH & JY TRUST  
Second Appellant**

**PERPETUAL TRUST LIMITED AS  
TRUSTEE OF THE RH & JY TRUST  
Third Appellant**

**AND**

**WORKSAFE NEW ZEALAND  
Respondent**

Hearing: 25 September 2025

Court: Cooke, Palmer and Whata JJ

Counsel: A S Butler KC and B R Webster for Appellants  
A S Bagchi, B M Finn and T M Williams McIlroy for Respondent

Judgment: 10 February 2026 at 11.00 am

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**JUDGMENT OF THE COURT**

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**A The appeal is allowed in part.**

**B We answer the questions of law as follows:**

- (a) Is a trust a “person” under the Health and Safety at Work Act 2015?  
Yes, a trust, or the trustees acting collectively, can be a person  
identified in the way set out at [54].**

- (b) Can the trustees of a trust comprise a “body of persons” within the definition of “person” in the Health and Safety at Work Act 2015?  
Yes, the trustees can be a body of persons within the definition of “person”, identified in the way set out at [54].
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## REASONS

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### COOKE AND PALMER JJ

(Given by Cooke J)

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[1] The appellants are a trust and its trustees. They have been charged with certain offences under the Health and Safety at Work Act 2015 (the Act) following the tragic death of a child on a farm owned by the trustees for the trust. They have raised an issue over whether they are correctly charged as defendants. By decision dated 14 February 2023, the District Court held that no charges could be brought against the trust or the trustees collectively, and that only the trustees in their individual capacity

could be defendants.<sup>1</sup> On appeal to the High Court, Harvey J concluded that, whilst charges could not be brought against the trust itself, they could be brought against the trustees of the trust collectively.<sup>2</sup> The appellants now appeal to this Court following leave to appeal being granted.<sup>3</sup> The essential question for the Court is the identity of the person or persons who should be charged when the farm on which the alleged offences occurred was owned and operated by a trust.

### **Relevant background**

[2] On 17 September 2020, a six-year-old child and two four-year-old children were dropped off at the milking shed of a farm owned and operated by the RH & JY Trust (the Trust). They were the grandchildren and daughter of an employee of Kellisa Farms Ltd who was a sharemilker on the farm. They were dropped off near to the end of the employee's shift.

[3] While they waited, the children started riding on a backing gate — a mechanical gate that pushes the cows towards the milking shed for milking, and then returns to the end of the yard. Tragically, whilst the gate was travelling, the six-year-old child's jacket sleeve got caught in the machinery and he was pulled into it and suffered fatal injuries.

[4] At the time the Trust's trustees were Ms Jocelyn Brown, Mr Philip Roucher and Perpetual Trust Limited (PTL). PTL had only been appointed as a trustee five weeks prior to the accident. Mr Roucher has since died.

[5] The respondent, WorkSafe New Zealand | Mihi Haumaru Aotearoa (WorkSafe) brought criminal charges under ss 37(1) and 48(1) of the Act against Kellisa Farms Ltd, the Trust, and in an alternative to the Trust against the trustees — Ms Brown, Mr Roucher and PTL. Kellisa Farms Ltd pleaded guilty and was dealt with by way of fine and reparation. The trustees then raised an issue with the District Court as to whether it was valid to bring charges against the Trust itself. As a

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<sup>1</sup> *WorkSafe New Zealand v Kellisa Farms Ltd* [2022] NZDC 2490 [District Court decision] at [59].

<sup>2</sup> *WorkSafe New Zealand v RH & JY Trust* [2023] NZHC 3871 [High Court judgment] at [47].

<sup>3</sup> *RH & JY Trust v WorkSafe New Zealand* [2024] NZCA 326 [leave judgment].

consequence, WorkSafe brought an application pursuant to s 147 of the Criminal Procedure Act 2011 seeking a ruling.

[6] In the District Court the trustees' contention was essentially accepted. Judge Bidois held:<sup>4</sup>

[57] The case law and trust law principles support the proposition that a trust is not a person and cannot be held liable for the actions or failures of the trustees of the trust. Rather the trustee should be held personally liable.

[58] ... Personal liability is defined in the *New Zealand Law Dictionary* as "an obligation for which an individual is responsible". The [Trusts Act 2019] case law and the [Act] all support such a finding. There are legitimate options presented in the [Act's] prosecution framework to charge the trustees of a trust without necessitating a strained understanding of what a trust is. Thus to be found liable the [trustees] should be charged as individuals and not as a collective. Therefore the trustees are not a body of persons. Also a single trustee cannot be a body of persons.

[59] As such the charge against RH and JY Trust is to be dismissed and no charge is to be brought against "the trustees of the trust" collectively. The charges against the individual trustees of the trust as offenders remain and there is no challenge to that standing.

[7] WorkSafe then successfully appealed this decision to the High Court. Harvey J accepted that whilst the Trust was not legally a person, it could be charged under the provisions of the Act. He said:<sup>5</sup>

[25] I accept as a matter of principle, that notwithstanding the orthodox position that a trust is not a separate legal entity, the position can be displaced by specific legislation. The appellant highlighted several illustrative examples. As submitted by the appellant, the question is whether a trust (or its trustees collectively) meets the definition of a "person" in the specific context of the Act having regard to the legislation's text, scheme and purpose. The orthodox position that a trust is not a separate legal entity is relevant but not determinative.

[8] After reviewing the authorities, he then found that the Act had deemed that the Trust could be charged under the Act as a "person conducting a business or undertaking" (PCBU). He said:

[39] It would be a perverse outcome if the definition of a PCBU could include a body of persons made up of three loosely associated people carrying out business with an informal internal structure and pseudo-corporate features

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<sup>4</sup> District Court decision, above n 1.

<sup>5</sup> High Court judgment, above n 2 (footnote omitted).

in a manner where there is no separate legal entity in existence. Yet if those same three people were trustees and the business assets were held in trust, they would collectively no longer be a PCBU but instead become three separate PCBUs.

[9] He found, however, that it was not the Trust itself that should be named as the defendant, but the trustees of the Trust. He said of the argument that the Trust itself should be named as the defendant:

[42] ... there is force in the respondent's arguments that to do so would be contrary to a well-established body of trust law insofar as a trust is not a discrete entity. I have accepted that in some cases legislation may displace that position. However, in the examples cited by the appellant, the statutory definition explicitly includes trusts. Here, it does not. Given the widespread and well-known use of trusts in business in New Zealand, it could be expected that Parliament would have expressly included trusts in the definition as it has done in the other legislation. On the other hand, Parliament did not include trustees or trusts in the exclusions set out in s 17(1)(b). In a sense the Act is unhelpfully silent on the issue.

[43] Nonetheless, the interpretation to be preferred is that the trustees collectively are the "body of persons ... unincorporate" rather than the trust itself. In civil law, generally, liabilities accrue to the trustees. It is the trustees who are named as a party to litigation. Although as a matter of principle an entity does not need to be [a] legal entity to fall within the definition, there is the availability of this alternative which accords more closely to civil law and to reality. Invariably this area of law will have to interact with general trusts law, and conceptual consistency should be preferred.

[10] Leave to appeal has subsequently been granted by this Court in relation to two questions of law:<sup>6</sup>

- (a) Is a trust a "person" under the Health and Safety at Work Act 2015?
- (b) Can the trustees of a trust comprise a "body of persons" within the definition of "person" in the Health and Safety at Work Act 2015?

### **Arguments**

[11] Mr Butler KC for the appellants argued that the High Court was wrong in principle as a matter of trust law, the Act, and general principles of criminal liability. Fundamentals were important. The width of meaning given by the High Court to the phrase "body of persons" was unnecessary, as an orthodox recognition of trustee liability would not create a gap in the enforcement of the Act. Neither would it

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<sup>6</sup> Leave judgment, above n 3. The first question was included at the request of the respondent.

decrease deterrence, nor advance or improve workplace safety. Moreover, holding that the trustees of a trust are collectively liable as a body of persons would give rise to unfair and unanticipated outcomes. The Act is a criminal statute and it is not the function of the courts to make it more effective than what Parliament has actually provided. Control is the touchstone and, as the District Court found, the focus was on the individual contribution of the trustees to control the activity, rather than an amorphous collective. Criminal liability attaches to individual persons or entities rather than the trustees as a group. The High Court decision accordingly created a new form of criminal liability which cannot have been Parliament's intent. Trusts are very well-known phenomena in New Zealand with distinct features that affect the way businesses are run. There is no requirement under the Act or lacuna in the law requiring the outcome reached by the High Court.

[12] For WorkSafe, Mr Finn supported the analysis of the High Court Judge, and Miss Bagchi argued that on the correct interpretation the Trust itself could be charged.

### **Assessment**

[13] We recognise the force in Mr Butler's argument that fundamentals are important, and that concluding that a trust is a person who can be charged with an offence is apparently inconsistent with well-established principles of trust law. A trust is not a legal person. A trust is essentially a set of obligations that the persons who are trustees have.<sup>7</sup> These concepts are carried through into the Trusts Act 2019.<sup>8</sup> Given that a trust is not a legally recognised person, finding that it is capable of being criminally liable is apparently inconsistent with the very origin and nature of trusts.

[14] But whilst trust law creates a very strong starting point for addressing the issues of interpretation that arise, it is not determinative. Rather the task remains, as always, to identify the meaning of the legislation from its text in light of its purpose and

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<sup>7</sup> See *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36, [2023] AC 877 at [58]; and *Catholic Metropolitan Cemeteries Trust v Attorney-General of New South Wales* [2024] NSWCA 30, (2024) 116 NSWLR 314 at [17]–[19].

<sup>8</sup> See definition of express trust in the Trusts Act 2019, ss 12 and 13.

context.<sup>9</sup> That is so of statutes that create criminal offences as much as any other kind of statute.<sup>10</sup>

### *The terms of the Act*

[15] The relevant offence here arises under s 48 of the Act when a “person” fails to meet a relevant duty under the Act. The relevant duty alleged to be breached is a duty owed by a PCBU under s 37. The relevant definitions that are central to this case are provided in ss 17 and 16, which provide:

#### *Key terms*

#### **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.
- (2) In this section, **volunteer association** means a group of volunteers (whether incorporated or unincorporated) working together for 1 or more community purposes where none of the volunteers, whether

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<sup>9</sup> Legislation Act 2019, s 10(1).

<sup>10</sup> *Ihaia v R* [2022] NZCA 95 at [25]–[28].

alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.

[16] Person is defined in s 16 in the following terms:

**person** includes the Crown, a corporation sole, and a body of persons, whether corporate or unincorporate

[17] These definitions extend who can be a PCBU to unincorporated bodies of persons. So it is plain that questions of legal form are not determinative. It depends on who is conducting the business or undertaking as a matter of substance. On that basis alone, a trust can be treated as a PCBU if it is, in fact and as a matter of substance, a body of persons conducting the business or undertaking responsible for workplace safety.

[18] The relevant duty alleged to be breached here was under s 37, which relevantly provides:

**37 Duty of PCBU who manages or controls workplace**

- (1) A PCBU who manages or controls a workplace must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace, and anything arising from the workplace are without risks to the health and safety of any person.

...

[19] Trusts are frequently used in New Zealand not only as property-owning structures but also as vehicles to own and operate businesses. For farms this is a common structure. When a decision is made to transfer a farm to a trust, or establish a trust to own and operate a farm, the trust undertakes the business as a matter of substance. On the face of the provisions, a trust can accordingly manage and control the workplace for the purpose of s 37.

*The relevant authorities*

[20] The correctness of this approach is confirmed by the authorities. The same statutory language is used for the definition of “person” in the Resource Management Act 1991 (RMA).<sup>11</sup> In *Discount Brands Ltd v Westfield (New Zealand) Ltd* the

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<sup>11</sup> Resource Management Act 1991, s 2 definition of “person”.

Supreme Court addressed an argument that an incorporated society whose incorporation had lapsed was not a “person” for the purposes of rights associated with potential adverse effects of activities. The Court unanimously found that it was. Tipping J said:<sup>12</sup>

[170] In considering this issue I revert to the definition of person. It says that the word includes “a body of persons, whether corporate or unincorporate”. A corporate body is a legal entity in its own right distinct from its members. An unincorporate body of persons is not. An unincorporate body is rather like a partnership. It is recognised as having a separate existence, but in law it is no more than the aggregation of the individuals who are its members.

[171] Whether one views Northcote Mainstreet as a corporate or unincorporate body is not the immediate point. My point is that by making unincorporate bodies persons for Resource Management Act purposes, Parliament seems to have been looking more to substance than to legal existence or form. The concept of person is clearly designed to go beyond legal persons. It is necessary to be able to identify a body, but not a body which is legally recognised in its own right. The statutory policy evident from this expansive approach to persons suggests that a body of persons, as a body, ought to be able to rely on attributes pertaining to its individual members. That is an easier concept when the body is not a separate legal person than when it is. But in the present context the proposition must apply in both instances. The answer cannot, in this field, depend on issues akin to whether a corporate veil should be lifted.

[21] Similar issues were then addressed by this Court in *Cometa United Corp v Canterbury Regional Council*, where the issue was whether the appellants could be convicted of criminal offences under the RMA when there was no evidence that they were incorporated.<sup>13</sup> The same definition of “person” under the RMA applied. The Court held:

[23] Unincorporated bodies range from loosely to highly organised groupings. At one end of the spectrum are groups of people who have come together in an ad hoc way for a particular short-term purpose. Examples are residents who are opposing a development in their neighbourhood or parents of school children who want to take up a particular concern with the school. At the other end of the spectrum are bodies which are long-lived, have officers, governance arrangements and employees just as corporate entities do, and operate and present themselves to the public as established, independent organisations. Bodies of this latter type are distinct from (and more than) the individuals who make up their membership — as a practical matter, they have independent existence and act as independent entities ... This is presumably

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<sup>12</sup> *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597. See also at [126]–[127] per Blanchard J.

<sup>13</sup> *Cometa United Corp v Canterbury Regional Council* [2007] NZCA 560, [2008] NZAR 215. See also *Edwards v Legal Services Agency* [2003] 1 NZLR 145 (CA) at [26]–[28].

why s 29 of the Interpretation Act 1999 defines “person” to include an unincorporated body.

[22] And after setting out the relevant passages from *Discount Brands* the Court said:<sup>14</sup>

[32] These passages suggest that, in order to meet the definition, the unincorporated group must have some form of internal structure which enables it to take and implement decisions as a collective. If the group exists as a “collective entity” it can properly be viewed as a “body” of persons.

[33] Secondly, and following on from the point just made, a group constituting a “body of persons” is likely to have a similar general structure to a company, in the sense that it will have a decision-making process, people who have governance responsibilities and such like (a pseudo-corporate structure). Consequently, as is said in Ormerod at p 43:

When an unincorporated association is prosecuted, presumably the court must proceed by analogy to the law relating to corporations. Such associations have officials corresponding to the controlling officers of corporations and it is inconceivable that the association is liable for the act of any one of its members who has no part in the general management of its affairs.

[34] In other words, given that the unincorporated group must be capable of being described as a “body of persons” in order to be subject to the RMA, the attribution of actions which breach the RMA to the body as opposed simply to particular individuals is feasible. Practical difficulties in relation to matters such as service and enforcement can be addressed by means of the pseudo-corporate structure that an organisation meeting the definition of “body of persons” will have. We consider that this is the appropriate approach in the absence of specific provisions dealing with unincorporated bodies in respect of offences under the RMA.

[35] In our view, this meets Mr McVeigh’s submissions based on the absence in the [Summary Proceedings Act 1957] of provisions dealing with unincorporated bodies. He was correct to say that the [Summary Proceedings Act] applies to prosecutions under the RMA. But in our view the RMA clearly contemplates the prosecution of unincorporated bodies. We do not consider that this evident parliamentary intention should be frustrated by the absence of relevant provisions in the [Summary Proceedings Act]. Rather, as Ormerod indicates, the proper approach is that, in the case of unincorporated bodies that constitute “bodies of persons”, the courts will, where necessary, adopt processes analogous to those that apply in the case of corporations.

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<sup>14</sup> Referring to David Ormerod (ed) *Smith and Hogan Criminal Law* (11th ed, Oxford University Press, Oxford, 2005).

[23] On this approach, not every group of persons is treated as a “body of persons” meeting the definition. It will depend on whether, as a matter of fact, that group engages in collective decision-making in the manner described.<sup>15</sup>

### *The scheme of the Act*

[24] It becomes necessary to consider whether the approach described in *Cometa* is appropriate given the present Act. The purpose of the Act is set out in detailed terms in s 3. That includes purposes relevant to the present context. The Act provides:

#### **3 Purpose**

- (1) The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by—  
...
  - (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and  
...

[25] The Act then imposes duties on persons relating to decision-making concerning the workplace. Section 30 provides:

#### **30 Management of risks**

- (1) A duty imposed on a person by or under this Act requires the person—
  - (a) to eliminate risks to health and safety, so far as is reasonably practicable; and
  - (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.
- (2) A person must comply with subsection (1) to the extent to which the person has, or would reasonably be expected to have, the ability to influence and control the matter to which the risks relate.

[26] Significantly, the Act makes a distinction between duties on individuals who make workplace decisions, and the duties on a collective body that does so. As will

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<sup>15</sup> In *North v Commissioner of Inland Revenue* (1985) 7 NZTC 5,192 (HC), the High Court found that a trust was not a person for the purpose of stamp duty. We agree with the High Court that this case is distinguishable given the different statutory setting: see High Court judgment, above n 2, at [33].

be addressed in greater detail below, in ss 47–49 different penalties arise if duties are breached by a body of persons rather than an individual. Moreover, with a body of persons, there are duties on the “officers” of the body that give rise to separate liability. These provisions reflect that the focus of the Act is on the decision-makers responsible for a workplace. When the decisions are made by a collective body, different statutory provisions are engaged. We accept Mr Butler’s submission that control is a key foundation of the Act, but we consider that the Act also focuses on the kind of control exercised, and that it treats collective decision-making in a different way to individual decision-making. As WorkSafe submitted, this recognises the significance of systemic issues with workplace safety.

[27] The collective decision-making contemplated by the Act does not depend on the incorporation of the body of persons in question. That is apparent from the definition of “person”. The Act also provides non-exhaustive examples of unincorporated bodies of persons, including a partnership.<sup>16</sup> The Act was modelled on the Australian *Model Work Health and Safety Act*.<sup>17</sup> But in a departure from the Australian legislation, cl 48 of the Bill — which had provided that an unincorporated association could not commit an offence — was removed on the basis that the proposed legislation was “not consistent with New Zealand common law, which recognises that in some cases unincorporated bodies can be prosecuted”.<sup>18</sup> As Mr Finn submitted, it is likely that this was a reference to *Cometa*. No other relevant decisions were identified as the “New Zealand common law” being referred to.

[28] The Act accordingly draws a distinction between the duties of individuals and those of collective bodies. This forms part of the overall regime. That regime has a focus on workplace safety, and on substance rather than form. As Downs J said in *WorkSafe New Zealand v Dong SH Auckland Ltd* after analysing the Act:<sup>19</sup>

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<sup>16</sup> See ss 17–18. The explanatory note to the Health and Safety Reform Bill also made reference to a joint venture: see Health and Safety Reform Bill 2014 (192–1) (explanatory note) at 6.

<sup>17</sup> Enacted as the Work Health and Safety Act 2011 by the Commonwealth and by all Australian states and territories except for Victoria, and, at the time of the New Zealand legislation’s passing, Western Australia.

<sup>18</sup> Health and Safety Reform Bill 2014 (192–1) (select committee report) [select committee report] at 9.

<sup>19</sup> *WorkSafe New Zealand v Dong SH Auckland Ltd* [2020] NZHC 3368, (2020) 17 NZELR 841 (footnote omitted).

[28] Four things about all this stand out. First, the breadth of duties created by the Act. Second, the Act's emphasis of its purpose, including through creation of the principle that workers and others should be given the highest level of protection. Third, the breadth of the concept of a PCBU. Specified exemptions alleviate a wide-ranging definition. Fourth, the Act's emphatic rejection of form in the advancement of purpose.

[29] To elaborate the last point, it matters not if the duty holder is an individual, a company or a body corporate; whether the worker is an employee, contractor or subcontractor, an employee of a contractor or subcontractor, an employee of a labour hire company assigned to work in the business or undertaking, or so on and so forth. It matters not whether the person is conducting a business or undertaking (terms undefined, but inherently broad); or whether the person conducts the business alone or with others. Indeed, it matters not whether the business or undertaking is conducted for profit or gain.

[30] These features leave no room for the conclusion a PCBU must arise a particular way, still less the conclusion, a PCBU must be contractually tied to the activity in question. Were it otherwise, the Act would be frustrated. So too potentially, workplace health and safety.

[29] As indicated above, whether the correct defendant is a trust will depend on whether, as a matter of fact and in substance, the relevant business is being managed through the collective decisions of the trustees, rather than by individuals. The existence of a trust may not, in itself, conclusively establish this. Its existence will likely involve a presumption that collective decision-making by the trustees is involved. But, ultimately, who is making, or has the responsibility to make the relevant decisions, is a matter of fact. For the same reasons it may be that a trust with a single trustee is not a body of persons in the definition of "person" under the Act. We do not accept WorkSafe's argument that the body of persons includes the settlor and/or the beneficiaries as well as the trustees. The relevant body of persons will comprise those who make the business decisions, including the workplace decisions. When there is only one person making the decisions there is no body of persons who do so.

[30] In the present case, the facts before the Court are limited as the issue has emerged from a pre-trial application under s 147 of the Criminal Procedure Act. But the factual material before us is consistent with the existence of collective decision-making. For example, on PTL's appointment as trustee, its representative sent an email to the farming consultant retained by the Trust (copied to one of the other trustees) dated 18 August 2020 asking for the health and safety policies, saying that

these should be “reviewed on a regular basis” and that there should be “quarterly [health and safety] meeting minutes”. We see that as consistent with the health and safety issues being addressed collectively by the trustees. In any event there appears to be a basis for the Crown to allege that the relevant decision-making was made collectively by the trustees, and not by individuals.

[31] The Act is intended to cover all kinds of workplaces, including farms.<sup>20</sup> Section 37 relevantly provides:

**37 Duty of PCBU who manages or controls workplace**

- (1) A PCBU who manages or controls a workplace must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace, and anything arising from the workplace are without risks to the health and safety of any person.
- ...
- (3) For the purposes of subsection (1), if the PCBU is conducting a farming business or undertaking, the duty owed by the PCBU under that subsection—
- (a) applies only in relation to the farm buildings and any structure or part of the farm immediately surrounding the farm buildings that are necessary for the operation of the business or undertaking;
  - (b) does not apply in relation to—
    - (i) the main dwelling house on the farm (if any); or
    - (ii) any other part of the farm, unless work is being carried out in that part at the time.

...

[32] By these provisions, Parliament has addressed the implication of farms being places of residential occupation as well as workplaces. It has delineated the areas that are to be treated as workplaces for the purpose of the duties of the Act. This is consistent with the Act being a comprehensive code for workplace safety.

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<sup>20</sup> These provisions were also amended during the select committee phase. See select committee report, above n 18, at 8.

[33] Given this approach, it would be surprising if the particular legal structure used to own and operate the farm significantly altered the content of the duties, and the penalties flowing from the breach of those duties. Farms in New Zealand are often owned and operated by different kinds of legal structures, including companies, partnerships, and trusts. Once a collective decision-making structure of this kind is adopted, the duties imposed on collective decision-making bodies imposed by the Act naturally apply.

[34] We do not accept the appellants' argument that this approach creates unfair and uncertain criminalisation. Once the trustees of a trust decide that they will undertake business activities, the risks and obligations associated with those activities are taken on. These include the duties arising under the Act. Whilst we accept the submission that individual responsibility is a key feature of the Act, the responsibilities are intended to extend further when collective decision-making is involved. We also do not accept the submission there is no such thing as criminal liability of a group of persons collectively. That is what the Act establishes through its definition of a PCBU and of a person, as was recognised by this Court in *Cometa*.

[35] We also note that the report of officials to the Transport and Industrial Relations Committee on the Bill recorded that submitters had sought guidance as to how the meaning of a PCBU applied to different types of structures, including trusts, but that no change to the legislation was considered necessary because guidance on the new legislative framework could be provided by WorkSafe.<sup>21</sup> We again consider this recognises that Parliament was aware that the proposed legislation would apply to collective decision-making bodies such as trusts. The Act also allows for persons, or classes of persons, to be excluded from the definition of a PCBU by regulation.<sup>22</sup> Trusts have not been so excluded.

*Does trust law provide the answer?*

[36] The key issue in this case arises from Mr Butler's argument that *Discount Brands* and *Cometa* are distinguishable in the case of trusts, at least under the present

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<sup>21</sup> Ministry of Business, Innovation and Employment *Health and Safety Reform Bill: Officials' Report to the Transport and Industrial Relations Committee, Part B* (2015) at 19.

<sup>22</sup> Health and Safety at Work Act, s 17(1)(b)(v).

Act. That is because the law of trusts has very well-established principles that result in the trustees having all liability needed to make the Act work as intended. In *Cometa* the Court had said that a particular interpretation of legislation could be adopted “where necessary”.<sup>23</sup> But here it was argued that it is not necessary. There is no need to treat the Trust itself as the person undertaking the business. The trustees do so in accordance with these well-established principles. So it was submitted that the law of trusts provides all the answers to the questions arising under the Act in terms of criminal responsibility, and it would be wrong to revert to questions of substance that are inconsistent with those principles in interpreting the Act.

[37] We do not accept this submission. The Act, through its definitions, requires the consideration of substance and not just the legal form. When a trust exists to make decisions on a collective basis it is the more appropriate defendant than each individual trustee. We also consider a closer examination of the provisions of the Act, understood in light of its purpose, demonstrates that the appellants’ argument is inconsistent with the Act. We address the provisions that illustrate this point in turn.

(a) Maximum penalties

[38] First, the relevant offending in this case arises under s 48 of the Act, and there are different maximum penalties arising for different kinds of person. The Act relevantly provides:

**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:

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<sup>23</sup> *Cometa United Corp v Canterbury Regional Council*, above n 13, at [35].

- (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.

[39] Section 48(2) creates different maximum penalties depending on the type of person who is undertaking the business. The maximum fine increases for individuals who meet the definition of a PCBU or an officer of the PCBU (we address officers more fully below). If the PCBU is not an individual, the maximum penalty is higher, involving a fine not exceeding \$1.5 million. If the offending involves recklessness in the manner contemplated by s 47, the fines increase to \$300,000, \$600,000 and \$3 million, and an individual can be imprisoned.

[40] We consider that Parliament has prescribed different maximum penalties when the offender is an incorporated or unincorporated body for a key reason: the higher financial penalty for incorporated and unincorporated bodies arises precisely because such bodies exercise a form of collective decision-making in accordance with the requirements of the particular structure adopted. Such vehicles may also be associated with enterprises of a larger scale and risks of systemic failure. That is at least one apparent reason for a higher maximum penalty, whilst allowing for lower penalties when the relevant body is of a smaller scale.

[41] We consider it is contrary to Parliament's intent to conclude that the maximum penalty in s 48(2)(c) is not available when the collective decision-making body is a trust rather than a company, partnership or similar body. Such a distinction would be arbitrary and inconsistent with the all-embracing nature of the definition of person, and the intended reach of the Act.

#### (b) Officer liability

[42] The second point is that the Act creates separate duties on officers of a PCBU to which different offence provisions attach. Section 44 provides:

#### **44 Duty of officers**

- (1) If a PCBU has a duty or an obligation under this Act, an officer of the PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation.

- (2) For the purposes of subsection (1), an officer of a PCBU must exercise the care, diligence, and skill that a reasonable officer would exercise in the same circumstances, taking into account (without limitation)—
- (a) the nature of the business or undertaking; and
  - (b) the position of the officer and the nature of the responsibilities undertaken by the officer.

...

[43] The different maximum penalties referred to above would then apply. Significantly, there is a definition of “officer” in the Act. Section 18 provides:

### **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).

[44] These provisions are significant in two ways. First, the definition in s 18(a)(iv) shows that Parliament has turned its mind to unincorporated bodies of persons that are not partnerships, and that it seeks to address such bodies in a comprehensive way. This shows Parliament’s intent to comprehensively address, in a harmonised way, all legal structures that might be employed in the undertaking of businesses to which the duties

of the Act attach. The definition then refers to a position “comparable” to that of a director. When a trust undertakes the business, the position of a trustee of that trust meets this definition.

[45] The second point is that these provisions create separate individual liability for such persons, including trustees, if the separate elements for individual liability are established. If they are, then such individuals may be prosecuted as well as the relevant body. Yet on the appellant’s argument there is only one kind of potential liability — for the trustees as individuals — and any liability as an officer does not arise. We consider that this undermines the legislative intent.

(c) Indemnification

[46] There is a third feature of the Act that we consider is fatal for the appellants’ argument. Under s 29, insurance or indemnification in relation to the liability under the Act to pay a fine is prohibited. It provides:

**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.

[47] The terms of s 29(2) would prevent trustees from being indemnified from the assets of a trust. We do not accept that s 29 applies only to insurance policies referred to in the heading and s 29(1), or that the indemnification of trustees does not fall within s 29(2). Section 29(2) creates an additional series of prohibitions in broad terms. In our view, the indemnification that a trustee normally has against the assets of the trust under the principles of trust law falls within the terms of s 29(2).<sup>24</sup> We consider any creative interpretation that seeks to avoid that implication fails to give effect to the clear terms and purpose of the legislation.

[48] For this reason, the argument that the well-established trust law principles provide a coherent regime for liability under the Act breaks down. As a consequence of s 29, trustees cannot be indemnified from the assets of the trust, and they would face personal liability in a way that is inconsistent with trust law principles. Moreover, the assets of the trust would effectively be immune, notwithstanding that it is the trust assets that should be at risk given that the trust has engaged in the business. This would be contrary to the purpose of the Act. The assets of the body that engages in the business should face the consequences if the duties of the Act are breached.

[49] It is appropriate to consider these features together. On the appellants' argument, a trustee of a trust faces individual liability without any ability to indemnify themselves from the assets of the trust. By contrast, if the relevant PCBU is the collective of trustees, the individual trustees would only face such personal liability if they commit the offences as an officer arising from their personal duties imposed by the Act. That is not alleged here. Moreover, the trust itself would also face the financial penalty and the assets of the trust would be available to address any penalty. We consider that these features demonstrate why the appellant's argument is contrary to the text and purpose of the Act.

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<sup>24</sup> The indemnification from the assets of the trust is recognised in provisions of the Trusts Act, for example see ss 40–43.

## *Enforcement*

[50] A central feature of the appellants' argument was that imposing liability on the Trust itself is ineffective as it is not possible to enforce any penalty against the Trust. Only the trustees could be proceeded against. It was argued that the position is different for other bodies such as partnerships and friendly societies.<sup>25</sup> There is an inability to enforce penalties under the Act given that a trust's existence is not recognised at law. A number of other similar practical issues were referred to in support of this argument.

[51] We do not accept this submission. As this Court held in *Cometa*, legislation should be interpreted purposively to allow the machinery of the Act to function as intended. As the Court said, "difficulties in relation to matters such as service and enforcement can be addressed by means of the pseudo-corporate structure that an organisation meeting the definition of 'body of persons' will have".<sup>26</sup> In any event, such recourse would not be needed here. If a trust is made liable to pay a penalty, we consider that the penalty can be properly enforced — the trustees would be obliged to ensure that obligations of the trust were met in order to fulfil their duties as trustees. Moreover, the law of enforcement would apply in the normal way — the obligations of the trust would be enforceable by action taken against the individual trustees as the representatives of the trust.<sup>27</sup> But we see the approach adopted in *Cometa* as generally the answer to all the practical issues raised by the appellants.

[52] Such issues with enforcement will also arise in relation to the other unincorporated bodies of persons covered by the Act. In each case it will be a matter of making the Act work in light of the Act's intended effect. So the liability of partners will be enforced against each individual partner, and the liability of unincorporated societies will be enforceable against its members. We see nothing controversial in an approach that requires the trustees to meet the obligations of the Trust arising from any penalty imposed by the court. Neither do we accept the appellants' argument that

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<sup>25</sup> See s 23 of the Partnership Law Act 2019; and see *Campbell v Scott* [1995] 2 NZLR 345 (HC) at 354–356 in relation to s 160 of the Friendly Societies and Credit Unions Act 1982.

<sup>26</sup> *Cometa United Corp v Canterbury Regional Council*, above n 13, at [34].

<sup>27</sup> On a joint and several basis: see *Selkirk v McIntyre* [2013] NZHC 575, [2013] 3 NZLR 265 at [16]. We do not consider that this would involve indemnification prohibited by s 29 as it would not involve an indemnification of a penalty imposed on the trustee.

the respondent seeks to achieve “law reform by the backdoor”. We consider that accepting WorkSafe’s argument simply gives effect to the legislation as enacted.

*Is the Trust, or are the trustees collectively, the correct defendant?*

[53] It remains to consider whether it is the Trust, or the trustees of the Trust collectively, that are properly identified as the defendant to the proceedings.

[54] Harvey J preferred the latter approach.<sup>28</sup> But, in our view, once it is recognised that it is the body of persons acting collectively that is the person, and accordingly the PCBU under the Act, the question is only a semantic one relating to the label that is to be used to identify the body of persons. That label does not alter the substantive effect of the provisions. So, here, either label could be used — the trustees could be named in their capacity as the trustees of the Trust acting collectively, or the Trust itself could be named. The important point is that, if the trustees are named to identify the Trust, the trustees are not defendants in any individual capacity.

## **Result**

[55] For the above reasons, the appeal is allowed in part.

[56] We answer the questions of law as follows:

- (a) Is a trust a “person” under the Health and Safety at Work Act 2015?

Yes, a trust, or the trustees acting collectively, can be a person identified in the way set out at [54].

- (b) Can the trustees of a trust comprise a “body of persons” within the definition of “person” in the Health and Safety at Work Act 2015?

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<sup>28</sup> High Court judgment, above n 2, at [43].

Yes, the trustees can be a body of persons within the definition of “person”, identified in the way set out at [54].

## WHATA J

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[57] I dissent. I adopt the background and review of the Act laid out by Cooke J at [2]–[19]. I agree with Harvey J a trust cannot be a person.<sup>29</sup> I agree a group of trustees may be described as a “a body of persons”.<sup>30</sup> It is also common ground that, as Downs J put it:<sup>31</sup>

[28] Four things about [the Act] stand out. First, the breadth of the duties created by the Act. Second, the Act’s emphasis of its purpose, including through creation of the principle that workers and others should be given the highest level of protection. Third, the breadth of the concept of a PCBU. Specified exemptions alleviate a wide-ranging definition. Fourth, the Act’s emphatic rejection of form in the advancement of purpose.

[58] But, in the absence of express words, I would not impute to Parliament an intention to derogate from the law relating to trusts and trustee liability because of this.

### The question

[59] The question posed for consideration by WorkSafe on this appeal is as follows: where a business operates as a trust, does the Act only permit the regulator to prosecute each trustee separately for an alleged health and safety breach, or does the regulator have the option of prosecuting the trust — or its trustees collectively — as the “person” conducting the business?

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<sup>29</sup> High Court judgment, above n 2, at [49].

<sup>30</sup> At [25]. See above at [7]–[10].

<sup>31</sup> *WorkSafe New Zealand v Dong SH Auckland Ltd*, above n 19.

## The answer

[60] I respond to the question set out above on the assumption that trusts per se are in focus. Individual trustees conduct trust business. There is no need to invent trust personhood or collective trustee liability. Rather, consistent with the Act's purpose and orthodox principles of trust and criminal law, individuals may be liable "as trustees" for the non-compliant conduct of business using trust assets. Fines may be imposed on them with automatic recourse to those assets. A trust may however hold assets on behalf of a collective entity.<sup>32</sup> Whether a trust of this kind is subject to the Act and on what basis would need to be determined on the specific facts of the case.

## Analysis

[61] I commence with some fundamentals.<sup>33</sup> As a matter of generality:

- (a) A trust is an equitable obligation.<sup>34</sup>
- (b) A trust is not a person.<sup>35</sup>
- (c) Trustee liabilities are personal.<sup>36</sup>
- (d) Trustees are entitled to be indemnified for expenses paid or liability incurred while discharging, reasonably, trustee responsibilities.<sup>37</sup>

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<sup>32</sup> The facts in *Campbell v Scott*, above n 25, are illustrative of this potential. Tipping J noted in that case that the vesting of assets in trustees on behalf of a voluntary society indicated that the society was a separate legal entity. He also found that, given the legislative scheme of the Friendly Societies and Credit Unions Act 1982, the society could then be sued as a legal entity (at 349). However, there was no suggestion in that case that the trust itself was a person or that the trust was an unincorporated body that could be separately sued.

<sup>33</sup> These fundamentals are borrowed, in part, from Mr Butler.

<sup>34</sup> Andrew S Butler (ed) *Equity and Trusts in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2025) at [3.1.2]; and Trusts Act, ss 12 and 13. See also above at [13], n 7.

<sup>35</sup> Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) at [10.5]. See above at [13], n 7.

<sup>36</sup> *Equity Trust (Jersey) Ltd v Halabi*, above n 7, at [119]; and *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 324, cited with approval by Anderson J in *Macalister Todd Phillips Bodkins v AMP General Insurance Ltd* [2006] NZSC 105, [2007] 1 NZLR 485 at [42]. See also Trusts Act, s 81(1).

<sup>37</sup> Trusts Act, s 81(2)(a).

[62] These are no ordinary principles. They are rules made over centuries. Individual trustees use trust assets and incur liabilities based on them.<sup>38</sup>

[63] WorkSafe’s response is that substance should in any event prevail over form. Trusts, it says, are comprised of a body of persons (a settlor, trustees and beneficiaries) and trustees may make decisions collectively. It must follow that a trust conducts business as a person or body of persons and therefore a trust may be prosecuted as a person or as a body of persons. But that is a category mistake. Every action by a trustee using trust assets is premised on the rules of trust law just mentioned. Trusts and trustee collective entities do not exist as “persons”. Individual trustees, and only individual trustees, “conduct” business using trust assets in law and fact.<sup>39</sup> That is a matter of substance, not form. It is both the starting and end point of the analysis.

[64] The relevant authorities provide variable assistance. This Court in *Cometa* did not, on the facts, have trusts or trustees in mind.<sup>40</sup> In any event, the answer according to *Cometa* depends on the starting point. It relevantly found:

[23] Unincorporated bodies range from loosely to highly organised groupings. At one end of the spectrum are groups of people who have come together in an ad hoc way for a particular short-term purpose. Examples are residents who are opposing a development in their neighbourhood or parents of school children who want to take up a particular concern with the school. At the other end of the spectrum are bodies which are long-lived, have officers, governance arrangements and employees just as corporate entities do, and operate and present themselves to the public as established, independent organisations. Bodies of this latter type are distinct from (and more than) the individuals who make up their membership — as a practical matter, they have independent existence and act as independent entities ... This is presumably why s 29 of the Interpretation Act 1999 defines “person” to include an unincorporated body.

[65] Adopting that description of an unincorporated body, if the settled rules of trust law apply, then a trust does not qualify because it has no independent existence from the individual trustees that comprise it. For this reason a trust is nothing like the types

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<sup>38</sup> For recent statements on trustee powers, liability and indemnity, see *Cummins v Body Corporate 172108* [2022] NZCA 658, (2022) 23 NZCPR 884 at [10]–[12] and *Hong v Kinnon* [2025] NZCA 117, (2025) 6 NZTR ¶135-002 at [33]–[38].

<sup>39</sup> There are express statutory exceptions, none of which are relevant here.

<sup>40</sup> *Cometa United Corp v Canterbury Regional Council*, above n 13, at [23].

of unincorporated bodies contemplated in *Cometa*.<sup>41</sup> Those bodies enjoyed a form of juridical personality that was separately cognisable at law, including for the purpose of suit.<sup>42</sup>

[66] The observations in *Discount Brands* provide fertile ground for debate. The majority found that the unincorporated body in that case, Northcote Mainstreet, while a “person” with a right to object, it was not an “adversely affected” person under the RMA.<sup>43</sup> Blanchard J, speaking for the majority on this point, observed:<sup>44</sup>

[131] ... Northcote Mainstreet is neither a property owner nor a tenant at the Northcote Shopping Centre. The property interests of those of its members who are retailers at the centre may be capable of being adversely affected by an activity which, it is assumed, could affect the amenities of the centre but their representative body, whether corporate or unincorporate, having no property rights or interests itself, cannot experience those amenities or suffer from adverse effects upon them. There is an analogy with the example given in *Edwards* of a group of residents battling against a local authority:

Each has a separate residential property. Their personal interests are distinct. They may have formed a body with rules — perhaps even incorporated it — to represent their point of view. But a body like a ratepayers’ association does not own the land of its members and does not claim the benefit of their personal rights. Their individual rights would not be dependent on their membership of the body.

[67] By contrast Tipping J, in dissent on this point, adopted a more expansive definition of “adversely affected” person. He stated:

[171] Whether one views Northcote Mainstreet as a corporate or unincorporate body is not the immediate point. My point is that by making unincorporate bodies persons for [RMA] purposes, Parliament seems to have been looking more to substance than to legal existence or form. The concept of person is clearly designed to go beyond legal persons. It is necessary to be able to identify a body, but not a body which is legally recognised in its own right. The statutory policy evident from this expansive approach to persons suggests that a body of persons, as a body, ought to be able to rely on attributes pertaining to its individual members. That is an easier concept when the body is not a separate legal person than when it is. But in the present context the

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<sup>41</sup> Four cases are cited by the Court: *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 12; *Willis v Association of Universities of the British Commonwealth* [1965] 1 QB 140 (CA); *Edwards v Legal Services Agency*, above n 13; and *Campbell v Scott*, above n 25. In all of those cases, the unincorporated body was clearly distinct from its individual members.

<sup>42</sup> For specific examples of this in civil law, including cases involving trusts, see discussion in *Campbell v Scott*, above n 25, at 350–355.

<sup>43</sup> *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 12. See also Resource Management Act, s 94.

<sup>44</sup> Footnote omitted.

proposition must apply in both instances. The answer cannot, in this field, depend on issues akin to whether a corporate veil should be lifted.

[68] The contrast in reasoning is significant. Blanchard J identified that the rights and interests of the unincorporated body were important and separate from its individual members when dealing with the “adversely affected” person provisions, while Tipping J did not treat the absence of legal personality as determinative. Notably however, Tipping J also linked Northcote Mainstreet’s “adversely affected” person status to members who have a qualifying proprietary interest. He most relevantly said:

[172] That leads me to the view that a body of persons should be regarded as being capable of being adversely affected for [s 94(2)(b) of the RMA] purposes if at least one of its members has a proprietary interest in the sense earlier discussed. In these circumstances the body can properly be treated as being the alter ego of its members. If no member of the body has a qualifying proprietary interest then the representative dimension is absent. The body itself, whether corporate or unincorporate, would have no separate interest which could be adversely affected for para (b) purposes.

[69] Returning to the present facts, applying the majority reasoning in *Discount Brands* on “affected person” to the interpretation of PCBU, as a trust or the body of persons comprising the trust cannot incur liabilities as separate entities, they cannot and do not conduct business. Nothing in the Act purports to confer on trusts or a body of persons comprising the trust the power to incur liability as a separate entity. And, even on Tipping J’s account, the body of the trust being the “alter ego” of its members, it cannot expose the trust assets to liability to third persons other than via an individual trustee.

[70] All of this underscores the flaw in the WorkSafe case. There is a marked difference between a body of persons characterised by the mere absence of legal personality and a trust or body of persons comprising the trust whose juralty (including rights, duties, powers and liabilities) are clearly prescribed by law, including statute.

[71] Relatedly, under the Trusts Act trustees of express trusts hold all the powers as absolute owner of trust property and in combination with the statutory right to reimbursement noted above, individual trustees enjoy an express statutory entitlement to pay the expenses or discharge liabilities incurred while acting as a trustee directly

from the trust assets.<sup>45</sup> These are referred to as indemnities. The true nature of this entitlement is a complex matter, and this is not the proper occasion to explain it.<sup>46</sup> However, the following statement by Sir George Jessel MR in 1880 provides a useful account of the purpose and function of trustee indemnities for present purposes:<sup>47</sup>

The trust assets having been devoted to carrying on the trade, it would not be right that the cestui que trust should get the benefit of the trade without paying the liabilities; therefore the Court says to him, You shall not set up a trustee who may be a man of straw, and make him a bankrupt to avoid the responsibility of the assets for carrying on the trade: the Court puts the creditor, so to speak, as I understand it, in the place of the trustee.

[72] In this way, trust law provides a ready built, coherent regime for making trusts pay for doing business — through individual trustees. In agreement with Harvey J, I do not consider s 29 of the Act cuts across this regime with the effect of immunising trust assets from liability to pay the fine.<sup>48</sup> Relevantly, s 29 prohibits indemnification of the fine “by another person”.<sup>49</sup> Put simply, a trustee is not being indemnified by a person, because the trust is not a person. Furthermore, they are not being indemnified for their personal wrongdoing, but for their wrongdoing as a “trustee” of the trust’s assets. In this way, they are in no different position to that of the sole trader who invests their own money to pay business related liabilities.

[73] But even if I am wrong in this, for the purpose of criminal liability, I would hold that WorkSafe may prosecute the defendant “as trustee” with payment of the fine out of the assets of the trust.<sup>50</sup> To the extent this approach is novel, it gives vent to the

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<sup>45</sup> Trusts Act, ss 56(a) and 81(2)(b).

<sup>46</sup> There are various explanations of the nature of the indemnity, including that it is in effect, part of the trustees’ property (see *Equity Trust (Jersey) Ltd v Halabi*, above n 7, especially at [170]–[171] and *Hong v Kinnon*, above n 38, at [33]–[38], and compare the comments made in *Cummins v Body Corporate 172108*, above n 38, at [10]–[12]). The differing explanations were discussed by the High Court in Australia in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* [2019] HCA 20, (2019) 268 CLR 524 at [80]–[84]. The discussion in Law Commission | Te Aka Matua o te Ture *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2010) at [3.4]–[3.9] also refers to scholarly debate as to the nature of trusts.

<sup>47</sup> *Re Johnson* (1880) 15 Ch 548 (Ch) at 552.

<sup>48</sup> High Court judgment, above n 2, at [46]. Conceivably on WorkSafe’s case, if a trust is a person, a settlor creating the trust could not purport to indemnify the trust (or its officers) and the trust could not agree to be indemnified out of the assets settled in the trust.

<sup>49</sup> Health and Safety at Work Act, s 29(2)(c). Section 29 is set out by the majority above at [46].

<sup>50</sup> As noted above, for examples of this in civil law, see discussion in *Campbell v Scott*, above n 25, at 350–355.

statutory purpose, without doing serious violence to orthodox conceptions of individual trustee liability or the nature of trusts.

[74] Importantly, this approach fits seamlessly with fundamentals of criminal justice and sentencing law — that criminal liability attaches to individual responsibility and individual culpability.<sup>51</sup> Trustee liability is tied to the individual culpability of the trustee when acting in that capacity. Such a prosecution must necessarily be premised on conduct connected to the exercise of trustee powers. This encompasses the potential for individuals to be liable as trustees for systemic failings, a concern expressed by WorkSafe. Orthodox party or vicarious liability principles provide ample scope for prosecution of trustees who conduct business in a systemically flawed way.<sup>52</sup> There is no need to impute to Parliament an intention to introduce amorphous and untested concepts of trust personhood or collective trustee criminal liability. Trustees who have an agreed course of action and acted accordingly will be individually liable, as trustees, for the consequences of those actions.

[75] This approach also allows for fines to correspond to the nature and severity of the breach by individual trustees according to their individual level of culpability. In addition, it leaves open potential defences against fine for actions by rogue trustees who are clearly not acting in accordance with their trustee powers. By contrast, WorkSafe’s collective liability model jars heavily against criminal justice principles and leaves the Court with the extraordinary task of discovering how criminal liability is to be assessed and then enforced against a trust or a collective trustee entity that otherwise does not exist in law. Inevitably, the Court must, in the absence of a legislative scheme for doing so, either invent trust personhood or revert to individual trustee liability. On this, as between criminal liability based on trust personhood and collective liability enforced against individual trustees, the latter is more consistent with the ordinary rules of trust and criminal law.

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<sup>51</sup> The entire scheme of the Sentencing Act 2002 is directed to sentencing based on individual responsibility and culpability: see ss 7–9 dealing with the purposes, principles, and aggravating and mitigating factors. See also Geoff Hall *Hall’s Sentencing* (online ed, Lexis Nexis) at [1] and [APPII.6.1]. For an example of the significance of individualised justice to sentencing, see *Bugmy v The Queen* [2013] HCA 37, (2013) 249 CLR 571.

<sup>52</sup> Section 161 of the Health and Safety at Work Act states that the actions of an employee or officer will be deemed to be the action of the PCBU.

[76] There is a residual concern, namely that if recourse can be had directly to trust assets to pay the fine, individual trustees will be, in effect, immune from personal liability. But this concern is more theoretical than real. Trusts are a mechanism for managing assets held for the benefit of named beneficiaries, often the trustees and persons connected to them. Moreover, any immunity is a simple corollary of a decision by WorkSafe to prosecute an individual as a trustee. It is not obliged to do so.<sup>53</sup> In this regard, there is nothing in the scheme of the Act that targets trusts for special attention. Just like the sole trader who owns the business, an individual can be liable as individual trustee owner (PCBU), a general manager (officer), or a worker depending on the role and duties in focus.

[77] Finally, anchoring the WorkSafe position is the idea that applying orthodox trust and criminal justice principles will unfairly immunise trust assets from a maximum potential fine, undermining the Act's clear work safety purpose. But "unincorporated" trusts are no different to any other individual that does not enjoy limited liability. Many of these trusts will be small family trusts, comprising for example no more than the family home, likely significantly mortgaged for the business. If anything, on WorkSafe's approach, these types of trusts are unfairly singled out for maximum punitive treatment.<sup>54</sup>

[78] I accept, however, that a distinct body of persons of the *Cometa* kind may order their relations to enable decisions to be made on their collective behalf and for which they should be "collectively" liable. Such a body of persons may be governed by rules, agreements, custom or practice that bind them to collectively discharge the

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<sup>53</sup> The Health and Safety at Work Act identifies a primary duty of care for PCBUs as well as specific types of duty dependant on activity type (ss 36–43). Four types of duty holder are identified: individual PCBUs, officers, workers and other persons (ss 44–46). A person acting in breach of these duties may be prosecuted as an individual who is not a PCBU or an officer of a PCBU; or is a PCBU or an officer of a PCBU, or any other person (ss 47–49). A person may be subject to multiple types of duty where the person belongs to more than one of the three types of duty holder (s 32). The charge or charges will correspond to breach of duty under each of these relevant categories.

<sup>54</sup> On the WorkSafe case a trust is worse off than a body of limited liability investors or a body of unincorporated investors who have their private wealth separately held in limited liability vehicles or, ironically, in trusts.

liabilities incurred on behalf of the collective.<sup>55</sup> The absence of legal personality is not, on the definition of PCBU, determinative of whether the collective as a whole or members of the collective are then criminally culpable as an “other person”. The Act will look to the substance of their relationship, not the form of the business. In cases where the collective employs a trust to hold their assets, the trust assets may be exposed to the maximum fine via the prosecution of the individual trustees as representatives of the collective. But whether that is so or not is an issue of fact. Trusts, ordinarily conceived, do not qualify. Trusts, per se, simply do not conduct business, in law or fact, as persons or as collective trustee entities.<sup>56</sup>

[79] In the result, contrary to the conclusion reached by the majority, the Act does not create a new form of trust personhood or “collective” trustee entity liability. Rather, and consistent with the orthodox principles of trust and criminal law, individual PCBUs may be liable “as trustees” for the non-compliant conduct of business using trust assets. Fines may be imposed on them with automatic recourse to the trust assets.

[80] I would therefore allow the appeal.

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<sup>55</sup> As Dicey put it: “When a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which, by no fiction of law but from the very nature of things, differs from the individuals of whom it is constituted” (A V Dicey “The Combination Laws as Illustrating the Relation between Law and Opinion in England During the Nineteenth Century” (1904) 17 Harv L Rev 511 at 513). This Court in *Cometa United Corp v Canterbury Regional Council*, above n 13, at [23] referred to *Willis v Association of Universities of the British Commonwealth*, above n 41 as an example of an unincorporated body that was a distinct entity. At issue in the *Willis* case was whether a council, being a representative of a body of a number of universities, had separate personality. The Court held that it was, referring to this statement by Dicey at 147–148.

<sup>56</sup> As I have said, there may be express statutory exceptions. But they are not in issue before us.