

**IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE**

**CRI-2023-463-22
[2023] NZHC 3871**

UNDER the Criminal Procedure Act 2011; the Health
and Safety at Work Act 2015

BETWEEN WORKSAFE NEW ZEALAND MHI
HAUMARU AOTEAROA
Appellant

AND RH & JURY TRUST
First Respondent

PHILLIP NEVILLE ROBERT ROUCHER
Second Respondent

JOCELYN YVETTE BROWN
Third Respondent

PERPETUAL TRUST LIMITED (trading as
PERPETUAL GUARDIAN)
Fourth Respondent

Hearing: 21 August 2023

Appearances: D La Hood, T Williams McIllroy and A Bagchi for the Appellant
(via VMR)
A Butler KC and B Webster for the Respondents

Judgment: 21 December 2023

JUDGMENT OF HARVEY J

*This judgment was delivered by me on 21 December 2023 at 4.00 pm pursuant to
Rule 11.5 of the High Court Rules.*

Registrar/ Deputy Registrar

Introduction

[1] The RH & JY Trust, along with the other respondents, was charged by Worksafe New Zealand Mahi Haumarū Aotearoa¹ under the Health and Safety at Work Act 2015.² On 14 February 2023, Judge Bidois dismissed the charge against the trust on the basis that a trust cannot be prosecuted because it does not meet the definition of “person” in the Act.³

[2] Worksafe appeals on a question of law and leave is not opposed. In the circumstances, I am satisfied leave should be granted.

[3] The respondents oppose the appeal. They say there is no uncertainty or enforcement obstacles to prosecuting the trustees and the trust is being pursued merely to access the higher penalties available under the Act. The respondents contend that a trust fundamentally cannot fall with the definition of “person” and Judge Bidois’ decision was correct.

[4] 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”?

Background

[5] The charges relate to a tragic and fatal incident that occurred on 17 September 2020. A young child was visiting his grandfather at work on a dairy farm in Waioatahe.⁴ His jacket became caught in an exposed rotating shaft on a backing gate and he was fatally injured. The trustees are the legal owners of the Farm in accordance with the terms of the RH & JY Trust. However, the evidence suggests that farming operations were primarily carried out in the trust’s name.

[6] Worksafe filed identical charges under ss 37(1) and 48(1) and (2)(c) of the Act against the trust, and in the alternative, the three trustees Jocelyn Brown, Phillip

¹ Worksafe.

² The Act.

³ *WorkSafe New Zealand v Kellisa Farms Ltd* [2022] NZDC 2490.

⁴ The Farm.

Roucher⁵ and Perpetual Trust Ltd.⁶ Charging decisions are discretionary.⁷ In Worksafe’s view this was a situation where liability was more properly placed on the trust because it was conducting business and the failures were systemic failures of governance and management, rather than personal failures by the trustees.

[7] The trust disputed that it was a “person” for the purposes of the Act but declined to make an application under s 147 of the Criminal Procedure Act 2011 to have the charge against it dismissed. Accordingly, WorkSafe sought a ruling under s 147 that the trust is a “person”. It submitted in the alternative that the trustees of the trust are collectively a “person”.

Statutory framework

[8] The purposes of the Act are set out in s 3. The most relevant to this appeal are:

- (a) protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant; and
- ...
- (e) securing compliance with this Act through effective and appropriate compliance and enforcement methods[.]

[9] Section 37(1) provides that a PCBU (person conducting a business or undertaking) who manages or controls a workplace must ensure, as far as reasonably practical, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace are without risk to the health and safety of any person. Section 48 makes it an offence to fail to comply with this duty in a manner exposing an individual to a risk of death, serious injury or serious illness.⁸ The penalties are:

- (a) for an individual who is not a PCBU or an officer of a PCBU, to a fine not exceeding \$150,000:

⁵ Mr Roucher passed away in July 2023. The charges against him in a personal capacity were withdrawn.

⁶ A charge was also brought against Kellisa Farms Ltd, which was in a sharemilking agreement with the trust. Kellisa Farms pleaded guilty and has been dealt with by way of fine and reparation.

⁷ *Linfox Logistics (NZ) Limited v WorkSafe New Zealand* [2018] NZHC 2909 at [60].

⁸ Or any of the duties set out in subpart 2 or 3.

- (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.

[10] The Act’s criminal penalties therefore purposefully impose a higher maximum on entities as compared to individuals.⁹

[11] “Person” is defined in s 16 as including “the Crown, a corporation sole, and a body of persons, whether corporate or unincorporate”. PCBU is defined in s 17:

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

⁹ See *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020.

[12] This Court has previously commented on the “breadth of the concept of a PCBU”, noting that “[s]pecified exemptions alleviate a wide-ranging definition”.¹⁰ Downs J observed that the Act had an “emphatic rejection of form in the advancement of purpose”:¹¹

[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.

[13] In short, the legislation is designed to capture and impose liability on a broad range of actors and a narrow interpretation should not be taken when it would unnecessarily frustrate the Act’s application.

[14] Finally, it is relevant for the purposes of this appeal to highlight s 29, which prohibits insurance policies or contracts of insurance that indemnify a person’s liability to pay a fine under the Act.

Orthodox trusts position

[15] The parties accept that a trust is not a separate legal entity.¹² Rather, a trust is the relationship between the trustees and the trust property and the obligation to deal with that property in the terms set out in the trust deed for the benefit of the beneficiaries.¹³

¹⁰ *Worksafe New Zealand v Dong SH Auckland Ltd* [2020] NZHC 3368 at [28].

¹¹ At [28].

¹² *Commissioner of Inland Revenue v Chester Trustee Services Ltd* [2003] NZLR 395 (CA) at [37]; and *Wilmott v Johnson* [2003] 1 NZLR 649 (CA) at [32].

¹³ *Harrison v Harrison* HC Auckland CIV 2008-404-1270, 18 September 2008 and see Trusts Act 2019, s 13(a).

[16] Liabilities a trustee incurs in the performance of that trusteeship are personal to the trustee.¹⁴ However, trustees may be reimbursed from, or pay directly from, trust assets for any expense reasonably incurred in the execution of the trust.¹⁵ Some trust deeds contain a clause indemnifying the trustee more generally, but trustees cannot be indemnified for actions which are in breach of trust due to their dishonesty, wilful misconduct, or gross negligence.¹⁶ Generally, trustees are shielded from liability for the actions of their co-trustees.¹⁷ This principle is limited by the usual requirement to act jointly.¹⁸

District Court decision

[17] The Judge set out Worksafe's position, which was, in summary:

- (a) The approach taken in *Westfield (New Zealand Limited) v Northshore City Council* [*Westfield*], *Cometa United Corporation v Canterbury Regional Council* [*Cometa*] and *Edwards v Legal Services Agency* supports including a trust or a collective of trustees in the definition of body of persons.¹⁹ There are precedents in other Acts.²⁰
- (b) Public policy supports an expansive approach to achieve enforcement and thereby protect workers. In particular a trust will usually have greater assets than an individual but penalties would be confined to those that apply to individuals, undermining effective deterrence.
- (c) In some cases prosecuting trusts rather than trustees will better reflect culpability in light of trustee duties and collective decision-making roles. This would be consistent with how the Act treats company directors.

¹⁴ Trusts Act 2019, s 81(1).

¹⁵ Section 81(2).

¹⁶ Section 41; and see *McLaughlin v McLaughlin* [2018] NZHC 3198 at [37].

¹⁷ *Fruit Shippers Ltd v Petrie* [2020] NZHC 749 at [115] citing *Townley v Sherborne* (1633) Bridg 35 and referring to s 38(1) Trustees Act 1956.

¹⁸ Chris Kelly and others *Garrow and Kelly Law of Trusts and Trustees* (8th ed, LexisNexis, 2022) at [24.127]

¹⁹ *Westfield (New Zealand) Limited v North Shore City Council* [2005] NZSC 17 [*Westfield*]; *Cometa United Corporation v Canterbury Regional Council* [2007] NZCA 560 [*Cometa*]; and *Edwards v Legal Services Agency* CA256/01, 1 October 2002.

²⁰ Overseas Investment Act 2005, s 7(2)(f); Tax Administration Act 1994, s 3(b); Ngati Tama Claims Settlement Act 2003, s 11(3)(c); and Ngati Ruanui Claims Settlement Act 2003, s 14(4)(c).

[18] The trust's position was:

- (a) Trusts are distinguished in substance and form from partnerships, companies and other entities. The cases relied on by Worksafe can be distinguished with reference to *North v Commissioner of Inland Revenue*.²¹
- (b) Parliament deliberately excluded trusts from the legislation, even when broadening the definition of PCBU.
- (c) A trust is not a legal entity, so it is the trustees that are subject to the Act. Individual culpability will be a matter for each case.
- (d) Trustees are not a "body of persons"; given a trust can have a single trustee that definition would be farcical.
- (e) There are no enforcement obstacles to proceeding against the trustees. Worksafe's motivation is to access the higher penalty provisions.

[19] The Judge noted this was an issue of statutory interpretation and set out ss 37(1), 16 and 17, which have been mentioned above.

[20] He distinguished *Cometa* on the basis it did not deal with issues of the structure of a trust and/or whether a trust is a body of persons. He interpreted the issue as being "there was simply not enough evidence to prove that Cometa and Tradewood were corporate rather than unincorporate bodies for the purposes of an RMA prosecution."²² He further reasoned that fines could be enforced through a ship's New Zealand agent but there was no equivalent for trusts, because a trustee's liability is personal and the only way to enforce a claim is through that personal liability.

[21] Similarly, the Judge distinguished *Westfield* because it related to a body corporate which had let its incorporation lapse. It did not relate to the Act or the definition of a trust.

²¹ *North v Commissioner of Inland Revenue* (1985) 7 NZTC 5,192 (HC).

²² *WorkSafe New Zealand v Kellisa Farms Ltd*, above n 3, at [40].

[22] Instead the Judge relied on *North v The Commissioner of Inland Revenue* in which this Court held that a trust was not a body of persons nor a person on the basis of s 4 of the Interpretation Act 1924 defining person as “including a corporation sole and also a body of persons whether corporate or unincorporate”. That case referred to orthodox trust principles, namely that a trust is an equitable obligation binding trustees to deal with property over which they have control for the benefit of beneficiaries. The Court explicitly stated that “counsel seeks to include in the definition of person ... the trust and the trust is not a body of persons either corporate or unincorporate. A trust is a legal concept from which persons may benefit and have duties but is not a legal entity”.

[23] Ultimately the Judge found that Worksafe’s case was contrary to equity and common law principles. He questioned how a conviction could be entered and fine enforced against a trust. The Judge emphasised that trustees are accountable for the way they carry out their duties, and liabilities of the trust attach directly to them. He highlighted the proposition that a trust is not a separate legal entity.

[24] As to Worksafe’s alternative argument, the Judge found that because personal liability attaches to an individual, there was no basis to charge the trustees collectively. The Act’s prosecution framework presented legitimate options without straining the conception of a trust. Accordingly, the trustees should be charged as individuals.

Discussion

[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.²³ 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.

²³ Overseas Investment Act 2005, s 7(2)(f); Tax Administration Act 1994, s 3(b); Ngati Tama Claims Settlement Act 2003, s 11(3)(c); and Ngati Ruanui Claims Settlement Act 2003, s 14(4)(c). See also Te Ture Whenua Maori Act 1993 which gives the Māori Land Court exclusively authority to constitute five separate forms of trust under Part 12 of the that Act.

[26] As foreshadowed, effective enforcement is one of the purposes of the Act. Worksafe argued that the legislation should apply in a way that recognises the common use of trusts to run businesses. Counsel submitted that it would be wrong to treat the individual trustees as each a separate “person conducting a business or undertaking” when in reality they are (often) conducting the business collectively in accordance with the terms of the trust, as set down by the settlor and for the benefit of the beneficiaries. In addition, the collective decision-making duty on trustees whether unanimous by default or by majority “makes it contrary to reality to conclude that an individual trustee is the person conducting the business or undertaking”. Therefore, Worksafe argued, a trust running a business should be subject to the higher penalties set out in the Act, especially having regard to the existence of trust assets that usually exceed an individual trustee’s assets and the increase of maximum penalties from the earlier legislation to achieve effective deterrence.²⁴

[27] I agree with the above arguments as matters of policy. However, Worksafe’s proposed interpretation must be available on the construction of the Act’s text.²⁵ I therefore turn to consider the parties’ authorities.

[28] *Cometa* was a case dealing with a ship’s illegal dumping of light fuel oil. The relevant offence could only be committed by a “person”. Section 2 of the Resource Management Act 1991 (RMA) provided, identically to s 16 the Act, that “person” includes “the Crown, a corporation sole, and also a body of persons, whether corporate or unincorporate”. The body operating the ship was registered under Panamanian law and there was insufficient evidence as to its legal nature. It was also submitted that under the common law, an unincorporated body could not be guilty of a crime.

[29] The Court found that an unincorporated group must be capable of being described as a body of persons, falling within the s 2 definition.²⁶ To meet the definition of a “body” of persons, an unincorporated group must have some form of internal structure which enables it to take and implement decisions as a collective. It will likely have a similar general structure to a company in the sense that it will have

²⁴ *Stumpmaster v Worksafe New Zealand*, above n 9, at [47].

²⁵ See Legislation Act 2019, s 10(1).

²⁶ *Cometa*, above n 19, at [30]–[32].

a decision-making process, persons who have governance responsibilities, and other similar features.²⁷

[30] The Court of Appeal referred to the Supreme Court’s decision in *Westfield*.²⁸ Blanchard J stated, citing *Edward v Legal Services Agency*,²⁹ that a number or group of persons “must be regarded as a body” if their internal affairs are regulated such to create a structure by which they can be recognised as a collective entity. The Court of Appeal also referred to Tipping J’s discussion where he found that the s 2 definition focused more on substance than “legal existence or form”.³⁰ Tipping J confirmed that to fit the definition it is necessary to identify a body but “not a body which is legally recognised in its own right”.³¹

[31] The first important point is that there are similarities in the statutory context of *Cometa* and the present case. The RMA contains offence provisions over regulatory matters that are designed to protect public interests such as protection of the environment and public health and safety.³² The Act similarly includes regulatory offence provisions designed to protect public interests. Tipping J’s observation that the RMA’s approach to defining “person” prioritises substance over form is echoed in the previously mentioned observation of Downs J about the Act’s provisions.³³ The proposition that businesses should not be able to escape liability or proper enforcement for breaching public duties by arranging themselves in particular structures or forms is apt to both contexts. Further, as noted, the definitions in s 2 of the RMA and s 16 of the Act are identical. I consider that *Cometa* is an applicable authority for the Act’s context to be applied with awareness of factual and statutory differences.

[32] The trustees relied on *North v Commissioner of Inland Revenue*.³⁴ That case was a dispute over whether the full amount of duties should be paid in relation to the sale and purchase of farming land. There was an exception if the purchaser personally

²⁷ At [33].

²⁸ *Westfield*, above n 19.

²⁹ *Edwards v Legal Services Agency*, above n 19.

³⁰ *Westfield*, above n 19, at [171].

³¹ At [171].

³² See Resource Management Act 1991, s 5 and ss 338–343D.

³³ *Worksafe New Zealand v Dong SH Auckland Ltd*, above n 10, at [28].

³⁴ *North v Commissioner of Inland Revenue*, above n 21.

farmed the land. It was common ground that a trust is not generally at law a legal entity but it was argued by the objector that a trust is a “person” for the purpose of the Stamp and Cheque Duties Act 1971. The definition of “person” was set out in the Acts Interpretation Act 1924 as including “a corporation sole, and also a body of persons, whether corporate or unincorporate”. Holland J held a trust is not a body of persons because it is not a legal entity, rather an equitable obligation binding the trustee to deal with trust property for the benefit of beneficiaries.

[33] Unlike *Cometa*, the statutory context of *North v Commissioner of Inland Revenue* was quite different to the present case. It was in a civil law and tax context rather than a criminal regulatory context. The context and purpose of the Stamps and Cheque Duties Act 1971 that applied to the interpretation of “person” were different.³⁵ Further, it should be noted that *North v Commissioner of Inland Revenue* is a lower Court’s authority than *Cometa* and *Westfield*, which are appellate decisions, and it pre-dates those decisions and indeed the enactment of both the RMA and the Act. The Judge recorded it was common ground that a trust “is not *generally* at law a legal entity”.³⁶ This recognises there may in some cases be exceptions, but in that case the orthodoxy prevailed. In terms of its specific facts, Mr North, the trustee, conceded that the trust was not personally carrying out the business of farming. In light of that factual concession, the case did not compel a close analysis of the definition.

[34] The New South Wales District Court has held that a trust “is not a separate legal entity that can be prosecuted” under the Work Health and Safety Act 2011 (NSW).³⁷ In *Safe Work New South Wales v Waycon Bulk Pty Ltd*, Waycon pleaded guilty to breach of duties under the 2011 Act. Waycon was the trustee of WJ & CA Family Trust which beneficially owned the assets used in the course of the business.³⁸ It argued, in relation to sentencing, it could not provide payment of the fine because it would be in breach of trust to do so. Waycon also submitted that it had invited the

³⁵ Legislation Act 2019, s 10(1).

³⁶ *North v Commissioner of Inland Revenue*, above n 21, at 5.

³⁷ *Safe Work New South Wales v Waycon Bulk Pty Ltd* (2015) 21 DCLR (NSW) 130, [2015] NSWDC 254 at [60]. See also *Solo Waste Aust Pty Ltd v McDonald* (2005) 141 IR 332; [2005] NSWIRComm 106 where the Full Bench of the Industrial Relations Commission (NSW) found that a trust is not a juristic person and the trustee appellant was the “previous offender” for the purposes of sentencing despite its previous conviction relating to a different trust.

³⁸ At [31].

prosecutor to join the trust to the proceedings so that recourse could be had to the income and assets of the trust. The District Court rejected those arguments, finding that the trust was not a separate legal entity under the 2011 Act. The Court also held that under the Trustee Act 1925 (NSW) and the common law, trustee indemnity would operate in the usual way.

[35] The Act is modelled on the Work Health and Safety Act 2011 (NSW). However, there is a key difference. During the second reading of the Bill, the committee removed cl 48, which prevented unincorporated associations from being liable for offences under the Act.³⁹ The committee stated that this change reflected the New Zealand common law, “which recognises that in some cases unincorporated bodies can be prosecuted”.⁴⁰ The equivalent provision remains in the New South Wales Act.⁴¹ In addition, New Zealand’s definition of person includes “a body of persons ... unincorporate” whereas under the Interpretation Act 1987 (NSW), person includes “an individual, a corporation and a body corporate or politic”. Unincorporated bodies therefore have a different status under New Zealand and New South Wales health and safety law. As Worksafe’s argument relies on a trust (or the trustees collectively) being part of the definition of “a body of persons ... unincorporate”, the New South Wales authorities are not particularly helpful.

[36] In considering the application of *Cometa* to the definition of “person” under the Act, I have had regard to the body of common law that calls for a wide interpretation of health and safety laws. In *Rice v Henley*, Isaacs J said:⁴²

In interpreting an Act which is directed to guarding against accidents and to the preservation of human life I think one should endeavour to carry out the objects of the legislature as far as the language and the Act will reasonably permit.

[37] In *Butler v Fife Coal Co Ltd*, Lord Shaw stated that the “commanding principle” was that “consistent with the actual language employed, the Act shall be

³⁹ Health and Safety Reform Bill 2014 (192-2), cl 48.

⁴⁰ Health and Safety Reform Bill 2014 (192-2) (explanatory note) at 9.

⁴¹ Work Health and Safety Act 2011, s 34(2).

⁴² *Rice v Henley* (1914) 19 CLR 19 at 22.

interpreted in the sense favourable to making the effective and the protection secure”.⁴³ His Lordship commented that this principle is “sound and undeniable”.

[38] The features of a “body of persons” set out *Cometa* are readily found in relation to the trustees. It is axiomatic that trustees have an internal structure enabling them to take and implement decisions as a collective. They have a decision-making process and individuals who have governance responsibilities. Counsel did not refer to any decisions where *Cometa* had been applied, even in an RMA context, to a trust or to a group of trustees collectively. However, on its face, the conclusion that the trustees meet the definition of a “body of persons” as set out in *Cometa* is not unreasonable.

[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 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.

[40] The respondents pointed out that one of the lines of reasoning in *Cometa* was that if the definition of body of persons was construed narrowly, there would be an enforcement lacuna under the RMA regarding overseas ships. Here, there would be no lacuna regarding liability: trustees can be charged individually, as they are in this case. What is similar however is that if the trustees can only be charged individually, Worksafe can only access the lower maximum penalties available for individuals. Where a business is operating using a trust structure there may be significantly more capital available and the \$300,000 maximum may, in some cases, not be an effective deterrent. Although this is not such an obvious instance as in *Cometa*, and also in *Worksafe New Zealand v Dong SH Auckland Ltd* a narrow interpretation could, in

⁴³ *Butler v Fife Coal Co Ltd* [1912] AC 149 at 178–179. See also *Hunter Quarries Pty Ltd v New South Wales (Department of Trade & Investment)* [2014] NSWSC 1580 at [15]–[19], citing *Waugh v Kippen* (1986) 160 CLR 156; 64 ALR 195 at 164.

some instances, frustrate s 3(e) of HSWA, “securing compliance with this Act through effective and appropriate compliance and enforcement methods”⁴⁴

[41] However, I have some apprehension as to whether the principles laid out in *Cometa* support a finding that the trust itself, rather than the trustees collectively, fall under the definition of “person”. The distinction is somewhat academic but there may be valid conceptual reasons to prefer one interpretation over the other in this context.

[42] Moreover, 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 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.

[44] There should be a wide interpretation given to the definition of PCBU insofar as it is necessary to achieve the purposes of the Act. Yet there does not appear to be any real advantage in prosecuting a trust rather than the trustees collectively in an enforcement context. In either case, the maximum penalty under s 48(2)(c) is

⁴⁴ *Worksafe New Zealand v Dong SH Auckland Ltd*, above n 10. In that case Dong SH Auckland Ltd was undertaking construction work but it was argued in the lack of a contractual arrangement it was not a PCBU. Had that argument succeeded the company could not be charged for its breach of duties.

available.⁴⁵ If there is a case of structural fault it will be the trustees' collective actions that are responsible so criminal liability is appropriately apportioned jointly. Conversely, the conceptual and practical difficulties with prosecuting a trust are avoided.

[45] The Judge found that Worksafe's alternative argument could not succeed because a trustee's liability is personal. Similarly, the respondents argued that it ran contrary to the principle that a trustee is not liable for the actions of a co-trustee. Although, as I have noted, consistency is desirable, these principles relate to civil liability and not criminal regulatory liability. In that regard, the provisions of the Act must be given the fullest effect possible on a fair reading of the language. Given many different types of business arrangements fall into the definition of a PCBU who is not an individual, consistency within the Act between these different types of arrangements, including the use of trust structures, must be the priority.

[46] Finally, for completeness, the matter of indemnity was the subject of some argument between counsel. I find that s 29 of the Act does not prohibit indemnity of trustees from trust assets under the trust deed. The section specifically refers to "insurance policy" and "contract of insurance". If it were intended to be broader and override a fundamental trusts principle it would be worded more broadly. In addition, as I have found above, a trust is not a "person" for the purposes of the legislation so it does not fall into the prohibition that "a person must not ... indemnify ... another person". That does not mean that trustees will always be indemnified from the trust assets when fined under the Act – that would be contrary to its overarching purpose. It will depend on the specific facts, the trust deed and the general law of trustee indemnity.

[47] Ultimately, my conclusion is that the learned Judge erred in law in not applying *Cometa* and *Westfield* and by holding that because a trustee's liability is personal under civil law, trustees could not be charged collectively as a single PCBU under the criminal provisions of the Act. Worksafe succeeds on its alternative argument that the trustees collectively are a body of persons for the purposes of the legislation.

⁴⁵ And in the equivalent provisions of the ss 47 and 49 offences.

However, in light of established trusts law, I consider that it goes too far to say applying *Cometa* to the Act's context allows for trusts to be prosecuted under that legislation.

Decision

[48] The appeal is allowed in part.

[49] The answer to the question can a trust (or its trustees collectively) meet the definition of "person" in s 16 of the Health and Safety at Work Act 2015 is: a trust is not a person under s 16; the trustees of a trust collectively are a "body of persons" within the definition of "person" under s 16 of the Act.

[50] The appropriate charging adjustments to be made in light of this decision are a matter for Worksafe and the District Court.

Harvey J