In the Supreme Court of New Zealand **SC 32/2026**
I Te Kōti Mana Nui O Aotearoa **CRI 2023-463-22**

Between	**RH & JY Trust** **First Appellant**
And	**Jocelyn Brown** **Second Appellant**
And	**Perpetual Trust Limited** **Third Appellant**
And	**WorkSafe New Zealand** **Respondent**

Appellants' submissions on appeal

1 July 2026

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May it please the Court,

1. Introduction and summary of position

1.1. The question on appeal is *whether a trust and/or the trustees of a trust acting collectively is a "person" as defined in the Health and Safety at Work Act 2015* (**HSWA**). That question arises because, to be prosecuted, an accused must be a "*person* conducting a business or undertaking" (**PCBU**).

1.2. If the question were simply "is the trust a person?" or "are the trustees of a trust collectively a person?" all would quickly agree the answer is "no." The respondent (**WorkSafe**) suggests that by adding the words "…for the purposes of HSWA" to the question, the answer becomes "yes." The appellants disagree.

1.3. First, the long-standing, orthodox answer should govern unless there are compelling reasons regarding the efficacy of HSWA that demand otherwise. The orthodox approach to trustee obligations, liabilities and indemnities is the result of not just years, but centuries, of development. Those principles should not lightly be cast aside. In the absence of express language, there is no basis to presume Parliament intended a statute to be interpreted counter to that orthodoxy.

1.4. Second, neither the text nor the policy underpinning HSWA requires it. HSWA's safety and enforcement purposes are better fulfilled within established trust law.

1.5. Third, analogies to directors/company and partners/partnership do not hold up. It is incorrect to analogise between structures that the legal system has routinely treated as discrete bodies of persons (such as companies and partnerships), and 'a trust' – which the legal system has not.

1.6. Fourth, while the relevant offences and penalties derive from HSWA, all aspects of criminal procedure are governed by the Criminal Procedure Act 2011 (**CPA**) and associated statutes/rules. Those rules must apply consistently across all criminal cases, including HSWA prosecutions. WorkSafe's approach is not compatible with the laws of criminal procedure and would create unnecessary, practical problems down the line.

1.7. Fifth, the Court should not be extending the bounds of criminal liability – to introduce a new form of 'personhood' (for a trust) or concept of 'collective criminal liability' (for trustees) – unless convinced that is what Parliament intended. That is particularly so where the critical phrase, "…body of persons…unincorporate," is such a generic one. There is no evidence this was Parliament's intention.

1.8. Standing back, the fundamental reinterpretation of the existence/status of 'a trust' – as mooted here – is a bigger issue than PCBUs or HSWA. If trusts or trustees collectively are to be classified as unincorporated bodies, the correct way to achieve that (and deal with the consequential enforcement and precedential issues) is through legislative reform following (counsel suggest) a Law Commission project. It is not a task this Court should embark on.

2. Background facts

2.1. The lower Courts' judgments set out the facts relating to the fatal incident. More relevant on this appeal is the background to the RH & JY Trust.

2.2. Ronald and Jocelyn Brown (husband and wife) purchased the dairy farm at 12 Dickinson Road, Waiotahi (**Farm**) around 1974 and operated it personally for many years. The Browns settled the RH & JY Trust on 26 November 1996 (**Trust Deed**)[1] for the purposes of holding the assets acquired during the Browns' marriage. The original trustees were the Browns and Russell Abbot. The final beneficiaries are the Browns' children. Discretionary beneficiaries include essentially all relatives of the settlors or final beneficiaries.[2]

2.3. Mr Abbot retired as trustee in May 2011 and was replaced by Colin Brown.[3] Ronald Brown died on 5 April 2014. On 14 July 2014, Phillip Roucher was appointed to replace him.[4] Colin Brown died in August 2016. No new trustee was appointed to replace him at that time.

2.4. On 24 April 2019, a sharemilking agreement (**Farmwise Agreement**) was entered into between Mrs Brown (as trustee) and Kellisa Farms Ltd (**Kellisa**). Mrs Brown is named as the "Farm Owner." The other trustees are not party to the Farmwise Agreement nor referred to in it.[5] Craig Purcell, a Livestock Improvement Farmwise Consultant, was appointed as

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[1] The Trust Deed is dated 26 November <u>1999</u>. This date discrepancy remains unexplained. But the Trust being settled in 1996 aligns with the transfer of the Farm into the names of the trustees in 1997.
[2] Trust Deed, cl 1(g) and 13(a).
[3] Deed of appointment (Colin Brown) dated 11 May 2011.
[4] Deed of appointment (Roucher) dated 14 July 2014.
[5] The copy of the Farmwise Agreement before the Court is signed by Kellisa only. It is unclear if it was also signed by Mrs Brown (possibly in a counterpart agreement), but in any event the parties have proceeded on the basis the Farmwise Agreement is binding.

the Farm Owner's Representative.[6] His role was to offer advice to the parties regarding effective farm management.

2.5. Pursuant to the Farmwise Agreement, Kellisa assumed responsibility for the management of the Farm, operations and herd in accordance with the directions of the Farm Owner.[7] For the purposes of health and safety, visitors to the workplace are under the direct supervision of Kellisa. However, both parties retain responsibility for ensuring the Farm health and safety plan(s) are complied with by all people on the Farm.[8]

2.6. On 11 August 2020, Perpetual Trust Limited (**Perpetual**) was appointed as a professional, independent trustee.[9] Prior to its appointment, on 10 February 2020, Perpetual emailed the trustees setting out the basis upon which it had been asked to step in and the approach it would take if appointed. Perpetual noted an apparent lack of documentation and advised its approach would firstly be to familiarise itself with all trust documents including health and safety, insurances and contracts with third parties.[10] Shortly after its appointment, on 18 August 2020, Perpetual emailed Mrs Brown (trustee) and Mr Purcell (Farm Owner's Representative) seeking copies of all health and safety policies for the farm. It noted the importance of the trustees having this information to ensure that what was in place met the requirements and was being reviewed on a regular basis.[11]

2.7. On 17 September 2020, the fatal incident occurred. At that point the trustees were Jocelyn Brown, Phillip Roucher and Perpetual (**Trustees**). Mr Roucher died, on 15 July 2023. Jocelyn Brown was removed as a trustee on 14 August 2023. Neither was replaced. Perpetual therefore remains the sole trustee to date.

2.8. The terms of the Trust Deed are relatively standard. No provision rebuts the general expectation that the Trustees will act unanimously.[12] Clauses 16 and 17 expressly acknowledge that the Trustees may hold additional, separate roles – as director, officer, or employee – of any company forming

[6] Farmwise Agreement, cl 7.
[7] Farmwise Agreement, cl 4.
[8] Farmwise Agreement, cl 64.
[9] Deed of appointment (Perpetual) dated 11 August 2020.
[10] Perpetual email dated 10 February 2020.
[11] Perpetual email dated 18 August 2020.
[12] The one exception is cl 12, which provides that where a trustee is also a beneficiary under the Trust, they may not exercise the discretionary powers under cls 4 and 7 in their own favour. The other trustees alone have that power.

part of the Trust assets. The Trust Deed also contains the usual trustee indemnities including (relevant to this case) clause 20.

3. Fundamentals – trusts

3.1. Trusts and trusteeship are a well-known feature of New Zealand's legal and economic landscape. It can be expected that when creating liability regimes under general statutes, Parliament is familiar with the unique features of trust arrangements and that those liability regimes apply in accordance with established trust principles, unless otherwise provided for.

3.2. A trust is not a legal entity.[13] This basic proposition has been restated time and time again by courts around the world. As the Privy Council put it recently:[14]

> A trust is not a legal person. Its assets are vested in trustees, who are the only entities capable of assuming legal rights and liabilities in relation to the trust. In particular, they are not agents for the beneficiaries, since their duty is to act independently.

3.3. Many authoritative decisions in Australia criticise the "false notion that a trust is a legal person."[15] For example, Gordon J in the High Court of Australia stated:[16]

> A trust has no legal personality, subject, of course, to statute…It is an equitable obligation binding on the trustee to deal with property for the benefit of the beneficiaries (or, in limited circumstances, a particular purpose or purposes). The trustee is personally liable for debts or liabilities incurred in the course of transactions concerning the trust. The liability of a trustee remains 'emphatically personal,' rather than being confined by the office of trustee.

3.4. Liabilities incurred by trustees are personal. Liabilities incurred by a trustee in the performance of their trusteeship are personal liabilities of the trustee alone.[17] They are not personal liabilities of the beneficiaries.[18] Nor do the liabilities attach to the trust property.[19] In this respect, trusts can be contrasted with, say, friendly societies. The liabilities of an unincorporated friendly society are not personal liabilities of the trustees, officers or members of the society.[20] They are liabilities of the society and payable out of the assets held by the society.[21] That is not true of trusts.

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[13] In Re Graham Pitt & Bennett, ex parte Nolan & Skeet (1891) 9 NZLR 617, 621.
[14] Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd [2018] UKPC 7, [2019] AC 271 at [59(i)].
[15] *Lewis v Condon* [2013] NSWCA 204 (2013) 85 NSWLR 99 at [79]. See also *Kelly v Mina* [2014] NSWCA 9 at [103]; *ACES Sogutlu Holdings Pty Ltd v Commonwealth Bank of Australia* [2014] NSWCA 402, (2014) 89 NSWLR 209 at [16]; *Jones v Matrix Partners Pty Ltd* [2018] FCAFC 40, (2018) 260 FCR 310 at [31].
[16] Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth [2019] HCA 20, (2019) 268 CLR 524, at [129].
[17] Trusts Act, s 81(1); *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 324, at 324; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, at 367; *Carter Holt Harvey,* above n 16, at [24].
[18] *Vacuum Oil,* above n 17, at 324, and *Carter Holt,* above n 16.
[19] *Investec v Glenalla*, above n 14, at [59(vi)]; *Re Morgan* (1881) 18 ChD 93; *Jennings v Mather* [1902] 1 KB 1 (CA).
[20] Wise v Perpetual Trustee Co [1903] AC 139 (PC).
[21] *Campbell v Scott* [1995] 2 NZLR 345 (HC) at 355.

3.5. Trustees are not liable for the acts or defaults of their co-trustees.[22] A liability incurred by an individual trustee is personal, not shared. Of course, where a liability has been jointly created – for example, by the trustees jointly entering a contract, or by more than one trustee engaging in tortious conduct that causes a loss – then there is shared (joint and several) liability.

3.6. Each trustee has a personal right to be reimbursed or exonerated from the trust property in respect of any expenses or liabilities they incur while acting as trustee, unless they did not act reasonably.[23] The fact that one trustee may have lost their right to indemnity does not deprive the other trustees of theirs.[24] The right of indemnity is personal, not collective; just as the liabilities of the trustees are personal, not collective.

4. Fundamentals – HSWA and criminal procedure

HSWA

4.1. Legislative purpose and scheme: HSWA came into force in April 2016, as a response to the Pike River Tragedy in 2010.[25] It largely duplicated the Australian Model Work Health and Safety Act (**Australian Act**) and replaced the Health and Safety in Employment Act 1992 (**HSEA**). HSEA was orientated around the employer/employee relationship – imposing duties in relation to their workplaces. HSWA broadened this, substituting the concepts of "person conducting a business or undertaking" (PCBU), "officer" and "worker."

4.2. A PCBU has the primary duty to ensure, so far as reasonably practicable, the health and safety of workers and others affected by its work. Officers have a duty to exercise "due diligence" to ensure the PCBU complies with its obligations.[26] Workers have responsibilities regarding their own health and safety and of those around them.[27] A person may have more than one duty (in different capacities).[28] More than one person may have the same duty.[29] Thus, there may be multiple PCBUs with overlapping duties in respect of the same workplace or plant.

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22 *Townley v Sherborne* (1633) Bridg 35, 37 (123 ER 1181); Trustee Act 1956, s 38(1) - not reproduced in the Trusts Act but considered to still represent the law: see Kelly & Kelly, *Garrow and Kelly's Law of Trusts and Trustees*, 8th ed, 2021, para 24.127, *Lewin on Trusts*, 20th ed, para 41-094).
23 Trusts Act, s 81(2).
24 Kelly & Kelly, *Garrow and Kelly's Law of Trusts and Trustees*, 8th ed, 2021, para 24.126, citing *In re Frith* [1902] 1 Ch 342 at 346.
25 See *Gibson v Maritime New Zealand* [2026] NZHC 813, at [45].
26 HSWA, s 44. What constitutes "due diligence" is defined in subsection (4).
27 Health and Safety Reform Bill, 2014 192-1, Introduction at p 1.
28 HSWA, s 32.
29 HSWA, s 33.

4.3. Little consultation or analysis was undertaken in advance of HSWA. There was no Law Commission review, only one Select Committee report, and nothing in the Parliamentary readings or debates relevant to this case. There was also significant public pressure for reform amid the fallout of Pike River.

4.4. The central pillar of HSWA is control. The regime seeks to place duties "on the people in a workplace who create the risk and therefore are best placed to deal with it."[30] By the same token, duty holders are required to comply with their duties only "*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 risk relates.*"[31] No control; no duty.

4.5. HSWA is a criminal statute. Despite sometimes being considered a 'quasi-civil' regime, HSWA is criminal at heart. Like most regulatory regimes, HSWA imposes duties on the relevant parties: PCBUs, officers, and workers, and prescribes offences for breach of those duties. Some offences are strict liability (as in this case under s 48); some require proof of *mens rea*.

4.6. Apart from prescribing the offences and maximum penalties, HSWA has no bearing on the laying of charges, prosecution, or sentencing of offences. All those procedural aspects are governed by the CPA, related rules and common law. This is significant, because any interpretation adopted in this case must be consistent not only with the purpose and scheme of HSWA, but also compatible with the general criminal law.

Criminal procedure

4.7. The Court of Appeal majority (**Majority**)[32] held that 'a trust' may be charged either as a distinct entity or via the "trustees collectively." It considered the difference to be a "semantic one" only.[33] That is not correct. The former requires recognising 'a trust' as a new form of personhood. The latter involves introducing a concept of collective criminal liability into New Zealand criminal law. The appellants say neither approach is proper.

[30] Health and Safety Reform Bill, 2014 192-1, at p 2 (first bullet point).
[31] HSWA, s 30.
[32] Cooke and Palmer JJ.
[33] Court of Appeal decision dated 10 February 2026 (**Court of Appeal**) at [53].

4.8. Criminal liability is individual. New Zealand criminal law does not recognise such a thing as "collective" criminal liability. This is reflected in all stages of criminal procedure – from the filing of a charge to enforcement of a fine.

4.9. Filing of charge: criminal proceedings are commenced under the CPA by filing a charging document against a "defendant." "Defendant" is somewhat circularly defined as any "person charged with an offence," and "person" is not defined at all.[34] Significantly, however, all categories of offences (1- 4) created under the CPA are defined exclusively with reference to an "individual" and a "body corporate".[35] Those are the only legal entities envisaged by the CPA as capable of being convicted and sentenced.[36]

4.10. Issuing summons: the prosecuting authority must issue a summons advising the defendant when to appear at court and the consequences of not attending.[37] The rules of service in the CPA and Criminal Procedure Rules 2012 provide for service only on an individual or a body corporate. If service cannot be made, or a defendant fails to answer the summons, a warrant may be issued for their arrest.[38]

4.11. Plea/election: a defendant is required to enter a plea to the charge(s), generally by the time of the second appearance.[39] For Category 3 offences (eg s 47 HSWA) an election is also required between judge-alone or jury trial.[40] The entry of a plea and election are decidedly individual decisions. With the possible exception of a plea being entered 'through counsel,' no person can enter a plea on behalf of another. Even where defendants are charged and tried together, each must enter their own plea/election separately.

4.12. Conviction/sentencing: following a plea or verdict of guilty, the defendant's conviction(s) must be entered in the permanent court record.[41] Criminal histories are personal. There is no provision for convictions to be entered collectively against multiple parties. Similarly,

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[34] The result is the definition from the Legislation Act 2019 applies: "**person** includes a corporation sole, a body corporate and an unincorporated body."
[35] See definition of "imprisonable offence"; "category 2 offence"; "category 3 offence" and other ancillary definitions of an "offence" throughout the CPA.
[36] Defendants charged separately may still be tried jointly: CPA, s 138. WorkSafe has issued a notice of joinder here.
[37] CPA, s 28. A summons is not required when the defendant is in custody.
[38] CPA, s 34 and 34A.
[39] CPA, s 39. If the defendant refused to enter a plea, a not guilty plea may be deemed: s 41.
[40] CPA, s 50 – the election arises following a not guilty plea.
[41] CPA, s 184 and Criminal Procedure Rules 2012, rr 7.1-7.2.

unlike civil liability which may be joint and several, sentences are imposed on an individual basis.

4.13. Enforcement of fines: a charge under s 48 of HSWA is finable only.[42] Part 3 of the Summary Proceedings Act 1957 governs payment and enforcement of fines. If a fine remains unpaid, the Court may as final recourse issue a warrant to arrest the defendant,[43] issue a warrant of commitment imprisoning the defendant,[44] and/or substitute a custodial sentence.[45]

4.14. Civil enforcement of fines: exercising its civil jurisdiction, the District Court may order a sentenced defendant to pay the Registrar the outstanding amount of a fine, and that is enforceable in the same way as any other judgment debt.[46] The usual civil remedies are available – eg warrants to seize and sell property.[47] Proceedings may also be removed to the High Court for bankruptcy/liquidation. The availability of civil enforcement is significant, because it demonstrates that whatever interpretation of 'a trust' is adopted in this case, will not be confined to HSWA, or even to the criminal law, but will also have application in civil proceedings.

4.15. The concept of collective criminal liability (between trustees) is not compatible with criminal procedure. The Majority dealt with this conflict cursorily. Rather than engage with the appellants' argument as to principle and practicality, the Majority invoked the Court of Appeal's comment in *Cometa* that: "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 person' will have."[48]

4.16. The Majority erred. First, in *Cometa,* the Resource Management Act 1991 (**RMA**) specifically provided for alternative enforcement against the particular unincorporated 'body of persons' in issue there (via their local agent). So the case is plainly distinguishable. Second, and more fundamentally, trusts do not have a "pseudo-corporate structure," so the

[42] The more serious, *mens rea,* version of the charge under s 47 is punishable by a fine, or up to five years' imprisonment (for an individual).
[43] Summary Proceedings Act 1957, s 88(4).
[44] *Ibid*, s 83(2)(b) if order for immediate payment of fine is not complied with, and s 90.
[45] *Ibid*, s 88AE.
[46] Ibid, at s 88A.
[47] District Court Rules 2014, r 119.47.
[48] Court of Appeal, at [51], citing *Cometa United Corporation v Canterbury Regional Council* [2008] NZAR 215 (CA), at [34]. The Majority considered this was "generally the answer to all the practical issues raised by the appellants."

practical problems inherent in the Majority's approach cannot be resolved in that way. Some matters, such as service, may be dealt with by analogy (eg by serving all trustees individually). But it does not resolve matters such as entering a plea for 'the trust' (Who gets to decide this? Must it be unanimous? What if one trustee disagrees?); nor the entering of a conviction (Whose criminal record does it go on? Do the trustees have separate criminal records, one personally and another in their capacity as trustee?). The Majority surmised that in each case it will simply be a matter of making HSWA work in light of its intended effect.[49] But, as outlined above, it is not HSWA that governs these matters. It is a suite of criminal procedure statutes that must apply consistently across all criminal cases, not just HSWA prosecutions.

4.17. The Majority observed that the above issues could arise in relation to any "unincorporated bodies of persons" prosecuted under HSWA or similar criminal statute.[50] That may be the case – plainly those statutes contemplate that at least some form of unincorporated body may be prosecuted. But it is not a point the Court needs to resolve for the purposes of this appeal. Suffice to say, there are some forms of unincorporated bodies (such as friendly societies) that have a sufficiently "pseudo-corporate structure" to be consistent with *Cometa*. But neither a trust, nor trustees collectively, have such a structure. The reality is as Whata J identified in dissent: in the absence of a specific legislative scheme, the Court has only two options when it comes to criminal procedure: (i) "invent personhood" (for a trust); or "revert to individual trustee liability."[51] Only the latter is consistent with established trust principles and criminal law.

5. HSWA – relevant provisions

5.1. HSWA (relevantly) provides the following definitions:

> **person** includes the Crown, a corporation sole, and a body of persons, whether corporate or unincorporate.[52]
>
> **PCBU** means:[53]
>
> (a) a person conducting a business or undertaking …(i) whether the person conducts a business or undertaking alone or with others; …; but
>
> (b) does not include (i) a person to the extent that person is employed or engaged solely as a worker in, or as an officer of, the business or undertaking.

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[49] Court of Appeal, at [52].
[50] Ibid.
[51] Court of Appeal, Whata J (dissent), at [75].
[52] HSWA, s 16.
[53] HSWA, s 17.

5.2. The definition of "person" is generic. The same definition is found in the RMA, the Crown Minerals Act 1991, the Biosecurity Act 1993 and the Building Acts 1991 and 2004. With the exclusion of "the Crown," the same definition also exists in multiple other statutes.[54] No definition of "person" was contained in the original Health and Safety Bill (**H&S Bill**).[55] The definition was added at the Select Committee stage, without comment.[56] No comment was made on it during the readings of the H&S Bill, or Parliamentary debates, either. In short, beyond the text of HSWA, there is nothing to indicate Parliament's intention vis-à-vis HSWA's application to 'a trust.'

5.3. In the lower Courts, WorkSafe sought support from other statutory regimes in which it says 'a trust' is recognised as a "person." WorkSafe submits those show there is nothing conceptually or inherently inappropriate about doing so.[57] Respectfully, those statutes are of no assistance in this case, for two reasons. First, they involve different definitions – of "overseas person"[58] and "representative entity"[59] – <u>not</u> "person." Second, they relate to highly specialised jurisdictions – tax and Māori Trust Boards in treaty settlements. Those statutes say nothing about the relevant question in this case: whether a trust or trustees (as a single entity) fall within the meaning of "person" in HSWA for the purposes of charging them with an offence. To the extent anything is to be drawn from those other statutes – it is that Parliament has *expressly referred to trusts* where it intends them to be caught by the legislation. The fact that Parliament did not do so in HSWA strongly indicates that it did not intend HSWA to apply to 'a trust' or 'trustees collectively' (as a discrete entity).

6. Interpretation exercise

"Body of persons, whether corporate or unincorporate" – agency

6.1. The definition of "person" in HSWA is inclusive. It is generally understood to include a human individual. Relevant to this case, it also includes "*…a body of persons, whether corporate or unincorporate.*" These final words are significant, because they indicate the type of 'body of persons'

[54] For example, the Official Information Act 1982, Animal Welfare Act 1999, Trustee Companies Act 1967, Local Government Official Information and Meetings Act 1987, Judicial Review Procedure Act 2016, Legislation Act 2019.
[55] Health and Safety Reform Bill 192-1 (2014), s 12.
[56] Transport and Industrial Relations Select Committee report on Health and Safety Reform Bill 192-2.
[57] WorkSafe High Court submissions, 31 July 2023, at [78], and WorkSafe Court of Appeal submissions, 15 September 2025, at [8.2].
[58] Overseas Investment Act 2005, s 7(2)(f), and Tax Administration Act 1994, s 3(b).
[59] Ngati Tama Claims Settlement Act 2003, s 11(3)(c) and Ngati Ruanui Claims Settlement Act 2003, s 14(4)(c).

contemplated by the Act, ie one akin to a company or unincorporated association.

6.2. The mere fact that a group of people act together for some purpose is not sufficient. There must be a connection between them – an associative identity – of the kind found in companies and unincorporated associations that qualifies the group as a *body* of persons. As explained further below, this distinctive associative identity arises because of the agency relationship that exists within those organisations. It is agency that generates the relevant kind of connection – a "pseudo-corporate structure" – that justifies the group of people being treated as a body of persons, even if they are not a separate legal person.

(a) Companies are an easy case, as the common law recognises a company as a legal person separate from its members.

(b) Partnerships and unincorporated associations – such as social clubs, friendly societies, etc – may also fall within the definition of "body of persons… unincorporate." This is because they have an associative identity as a *body* of persons, distinct from their individual members. This has led to courts recognising that at least in certain circumstances, structures such as partnerships and unincorporated associations have a legally significant "separate existence" from their members, even if they have not been incorporated.[60] As the English Court of Appeal put it, such bodies can have "in reality a substantial existence which is treated by all who deal with them as distinct from the mere sum of those who are for the time being members."[61]

6.3. Agency arises where a principal authorises the agent to act on the principal's behalf and subject to the principal's control. It is present in companies, in partnerships, and in some unincorporated associations. But it is not present in trusts.

(a) In a company, the shareholders come together voluntarily and commit their assets to decisions taken by the directors as legal agents for the company. Those decisions bind the company and its assets. The shareholders collectively control the membership of the board of directors, and decisions taken in general meeting.

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[60] Discount Brands Ltd v Westfield (New Zealand) Ltd [2005] NZSC 17 at [170], per Tipping J.
[61] *R v L* [2008] EWCA Crim 1970, [2009] 1 All ER 786, at [14].

(b) In a partnership, each partner is an agent for the firm as a whole, and thus for all the other partners.[62] Any decision properly made by one partner binds the entire body of partners as a firm. The partners have control over the membership of the partnership.[63]

(c) Unincorporated associations often operate the same way. Members of a social or sports club, for example, commit themselves by contract to decisions made by the management committee, who are given authority under the club rules to enter into agreements and manage the club's activities and assets. The management have agency authority over the club's assets.[64] The club members also control membership of the management committee, like shareholders.

6.4. Agency is what gives a body of persons a coherent identity beyond the mere sum of those who are, for the time being, members. Without agency, there is no "*body* of persons." Relevant to this case, agency is what makes the distinct identity of a company, partnership, or unincorporated association – separate from their members – susceptible to liability as a PCBU.

Trust does not involve agency

6.5. For the purposes of this appeal, the Court need not define the associative concept comprehensively (ie as it applies to other organisational structures). What matters is that the form of control involved in companies, partnerships and unincorporated associations – that gives rise to a discrete associative identity – is not present with a trust.

6.6. Trustees are not agents for the beneficiaries. Contracts (or other liabilities) entered into by the trustees are entered personally, as principal(s) rather than as agent(s) for the beneficiaries.[65] Those liabilities are a personal liability of each trustee,[66] and the beneficiaries are not bound by that liability. Unlike the other forms of business structure discussed above, the beneficiaries cannot change the identity of the trustees or direct trustee decisions.

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[62] Partnership Law Act 2019 (**PLA**), ss 17-18 & 20.
[63] PLA, s 50.
[64] *Wise*, above n 20, at p 149; *Campbell,* above n 21, 347 & 355.
[65] *Investec Trust,* above n 14, at [59(i)]; *Vacuum Oil,* above n 18, 324; *Carter Holt,* above n 16, at [24]; *Taylor v Davis* 110 US 330 (1884) at 334-335.
[66] Trusts Act, s 81(1); *Octavo Investments*, above n 17, 367.

6.7. Nor are trustees agents for one another. Each trustee is accountable for the way they individually carry out the duties imposed on them by law.[67] Each trustee must make their own decision regarding trust management and is liable only for their own decisions: there is no vicarious liability among trustees, and their decisions do not bind each other as agents in the way partners' decisions do. For example:

(a) If a decision is made by *all* the trustees, and *properly* made (ie, consistent with the trustee's statutory and equitable duties) each trustee is bound by reason of their *own* personal agreement, and so all are bound. If the trustees *together* do something that is *improper*, they are all personally liable for that improper action, by reason of their personal participation in it. The liability is joint and several (even where each trustee's contribution to the breach is different).[68] But it is still individual because "upon entering the office each individual trustee has a separate responsibility to ensure that the terms of trust are carried out."[69]

(b) If *one* out of a group of trustees acts *improperly*, the others are not rendered liable unless they personally breached their own duties (eg, in failing to prevent the improper conduct).[70]

6.8. Trusts lack the associative element that is needed to justify treating the trustees as a body of persons. As Whata J held, trusts do not conduct business, as a matter of law or fact, as a discrete entity.[71]

6.9. This position is reinforced by the fact that companies, partnerships and unincorporated associations are all formed by deliberate, voluntary association between the members. Trusts are not. Beneficiaries frequently have no involvement in the formation of a trust, and do not make a choice to associate with the trustees or other beneficiaries. That associative choice matters because it generates agency in those other arrangements, and trusts do not involve agency.

6.10. This potentially explains why Parliament referred to those other forms of business organisation in the definition of "person," but not to trusts. "[B]ody

[67] Trusts Act 2019, s 13. See also ss 22(a) and 28.
[68] *Selkirk v McIntyre* [2013] NZHC 575, [2013] 3 NZLR 265, [17] & [45] (Katz J); *Westpac Banking Corp v Savin* [1985] 2 NZLR 41, 54 (Richardson J); *Re Mulligan (deceased)* [1998] 1 NZLR 481, 512 (Panckhurst J); *Goodwin v Duggan* (1996) 41 NSWLR 158, 162-164 (CA); *Bahin v Hughes* (1886) 31 ChD 390, 396 & 398 (CA); *Lewis v Nobbs* (1878) 8 ChD 591, 595.
[69] *Re Mulligan,* above n 68, at 502.
[70] For example, *Shepherd v Harris* [1905] 2 Ch 310; *Austin v Austin* (1906) 3 CLR 516.
[71] Court of Appeal, Whata J (dissent), at [63] and [78].

of persons…unincorporate" is an entirely inapt description for a trust. Given their prevalence in New Zealand, if Parliament had intended to include a trust (as a distinct entity) within the scope of HSWA, one would expect it to have said so expressly, rather than relying on such a generic and inaccurate term. That is particularly so given it would be a dramatic departure from established trust principles. As noted at paragraph 5.3 above, Parliament has in rare circumstances expressly included a trust and/or the trustees in statutory definitions, typically, in order to make liability 'stick.' Parliament could have done so in this case, but chose not to.

6.11. This does not mean trustees avoid liability under HSWA. The policy aims of the statute are still achieved. Each trustee is "a person conducting a business or undertaking" and liable as a PCBU. Trustees may also be individually liable as "officers" (see [7.14] below). There is simply no need or justification for treating the trust (or the trustees collectively) as a separate entity or "body of persons." The very point of the introduction of the concept of a PCBU was to recognise that multiple parties (PCBUs) will often share control over a workplace and to acknowledge the overlapping nature of their duties.

6.12. It would be grossly unfair for a trustee who did not participate in a decision/action, to be held criminally liable because other trustees engaged in action that breached their HSWA duties unless the defendant trustee bore personal culpability for that breach. To treat the trustees as a collective further generates a risk that one or more of a group of trustees will sit back and allow the 'active' trustees to run the trust. Courts have deliberately refused to allow trustees to take that position, emphasising that each is liable for their own performance of the trust. To allow trustees to be passive "would act as an opiate upon the conscience of the trustees: so that instead of the *cestui que trust* having the benefit of several acting trustees, each trustee would be looking to the other or others for a right of indemnity, and so neglect the performance of his duties."[72]

[72] *Bahin*, above n 68, at 398 (Fry LJ). See also *Selkirk*, above n 68, at [42]-[45].

7. Court of Appeal (Majority)'s analysis is misconceived

7.1. The Majority held that a trust – whether as 'the trust' or 'the trustees collectively' – is a discrete entity in order to bring it within the meaning of a PCBU.[73] That conclusion is based on incorrect assumptions about trusts and a flawed analysis of HSWA.

Linguistic trap of treating 'a trust' as an entity

7.2. While apparently accepting the orthodox position that a trust is not a legal person[74] the Majority almost immediately slides back into the linguistic trap of treating a trust as an entity. For example, the Majority states:[75]

> For farms [trusts are] 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 purposes of s 37.
>
> [Emphasis added]

7.3. The false notion that a trust exists as something apart from the trustees, is present throughout the Majority's analysis, and assumes away the very question to be decided. One may refer to a business as being run 'by a trust,' but that is shorthand. Legally and factually it is the trustees that run the business – "the trust" has no existence capable of running anything.[76]

7.4. This erroneous assumption flows through to the Majority's (incorrect) assertion that a trustee occupies a position akin to that of a director.[77] By analogy, they consider a trustee must therefore be distinct from the trust in order to bear officer liability under HSWA.[78] That view is flawed in several ways: (i) the assumption on which it is based (about trusts as entities) is wrong; (ii) it misunderstands the different roles of trustees and directors; and (iii) it overlooks the possibility, clearly recognised in s 32 of HSWA, that one person can owe duties in different capacities – eg, as a PCBU and as an officer or worker. A trustee may occupy any or multiple of those positions, depending on the role(s) they perform. None of that requires the court to treat 'the trust' (or the trustees collectively) as an entity.

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[73] Court of Appeal, Majority, at [44].
[74] *Ibid*, at [13].
[75] *Ibid*, at [19].
[76] *Taylor v Davis* 110 US 330 (1884) at 334-335: "When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee."
[77] Court of Appeal, at [44].
[78] *Ibid*, at [45].

"Collective decision-making" is not the test

7.5. The Majority draws from *Discount Brands* and *Cometa* the proposition that "collective decision-making" is what identifies a "body of persons... unincorporate."[79] It then concludes that HSWA "…accordingly draws a distinction between the duties of individuals and those of collective bodies" (by different maximum penalties).[80] Neither conclusion is justified.

7.6. As discussed further below, *Discount Brands* and *Cometa* both arose in unique and distinguishable circumstances. The discussion of what comprises unincorporated bodies was specific to those circumstances, does not distil to a single concept of 'collective decision-making' and is not applicable to trusts. HSWA imposes duties on any <u>person</u> who conducts a business, irrespective of whether they do that alone or with others.[81] Section 48 imposes different maximum penalties depending on the <u>nature of the person</u> (individual or "any other person") <u>and the role</u> for which they have been prosecuted (PCBU, officer or worker). Neither the duties nor the maximum penalties are predicated on collective decision-making.

Trustee decision making is <u>not</u> collective

7.7. The Majority's analysis fails to engage with the core question: whether 'a trust' is a "body of persons…unincorporate" for the purposes of HSWA. Rather than addressing the true nature of the trust arrangement, it lumps trusts together with other forms of incorporated and unincorporated bodies, on the misconceived basis that they all involve collective decision-making.

7.8. For the reasons outlined above, that is not the relevant consideration. But, in any event, trustees do not make trust decisions as a collective. Trustees may make decisions <u>jointly</u> (separately, but together), but that is not the same thing as making them <u>collectively</u> (as a single unit). Trustees must agree unanimously on action regarding trust assets, and their decisions taken together dictate whether action is taken. But each trustee is individually responsible for their own decision and bears the consequences of it alone. By comparison, directors vote on decisions for the company. Taken *collectively*, those decisions become the decision of the company (as a discrete entity). The company is an incorporated body and legal

[79] Court of Appeal, at [23].
[80] *Ibid*, at [28]; see also at [33].
[81] HSWA, s 17(1)(a)(i).

person. The board of directors is not.[82] Each director is still responsible for their own decision and can be personally liable as an officer if their decision breaches their duties.

Maximum fines – a red herring

7.9. The Majority asserts that the higher penalty in s 48 applies to incorporated and unincorporated bodies "…*precisely because* such bodies exercise a form of collective-decision-making…"[83] and that to hold otherwise would undermine Parliament's intent.[84] The Majority does not explain what the apparent connection between collective decision-making and the need for a higher penalty is. Respectfully, there is none – HSWA is clear that liability as a PCBU arises irrespective of whether a person conducts a business alone or with others.[85]

7.10. (Un)incorporated bodies attract the higher penalty solely because they fall in the category of "any other person" in s 48 (not "individual"). Even then, they are not necessarily always collectives. A 'one-man band' company attracts the higher penalty despite the absence of collective decision-making. On the Majority's interpretation, so would a 'single trustee' trust.

7.11. The real reason for the distinction in maximum fines (as in all criminal statutes) is that companies cannot be imprisoned, and a higher maximum fine avoids making a fine a mere licence fee for those companies that are large and valuable. The Majority belatedly acknowledges this, but only as a secondary factor.[86]

7.12. The Majority's reasoning is also circular: (i) it relies on its finding that a trust is an unincorporated body (not an individual) to say the higher penalty applies;[87] but (ii) conversely, relies on the existence of the higher penalty (and that a trust is not an "individual") to justify interpreting a trust as an unincorporated body.[88]

7.13. Nothing in the text of HSWA, nor its legislative history, suggests Parliament intended a trust to attract either the higher or lower maximum fine. This is, at best, a neutral point in the interpretation exercise. That is particularly so

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[82] Similarly, the board of management of a Friendly society is not a person, even where the society has a separate existence: *Campbell v Scott*, above n 19, at 350.
[83] Court of Appeal, at [40].
[84] *Ibid*, at [41].
[85] HSWA, s 17(1)(a)(i); cf Majority at [33].
[86] Court of Appeal, at [40].
[87] *Ibid*, at [40].
[88] *Ibid*, at [41].

given that where there are multiple trustees (as is usually the case) the cumulative maximum penalty will often exceed the higher maximum penalty for a single entity.

Liability as an officer

7.14. The Majority justifies holding 'the trust' liable as a single entity on the basis that it allows trustees to be charged individually as "officers." In its view, the appellants' position means only one kind of liability is available for trusts: the trustees as PCBUs. This is misconceived for two reasons.

7.15. First, the Majority appears to presume that "officer" liability must necessarily exist in a trust arrangement. That is because of the way the Majority (inaccurately) analogises the role of a trustee to that of a director. That analogy is unnecessary – because "officer" already broadly includes any person who exercises significant influence over the management of a business – and it misdirects the Majority. Officer liability will not necessarily exist in every case (trust or otherwise). The duties on PCBUs and officers are different.[89] However, the courts have recognised that the same conduct by, for example a director, may provide a basis for both an "officer" charge and/or a "PCBU" charge, and that to include both would be duplicative.[90] For this reason, "officer" prosecutions under HSWA are relatively rare (the preference generally being to charge the PCBU alone). Some standout personal conduct by the officer, unrelated to the broader conduct of the organisation, is generally required.[91]

7.16. Second, officer liability may still arise on the appellants' orthodox approach. Officer liability is directed at decision-making attributable to the officer individually, rather than to the company, partnership, etc as a whole. HSWA is clear that a person can owe duties in more than one capacity if they belong to more than one class of duty holder.[92] Where a trustee has undertaken such decision-making in some other capacity – for example, as site manager – officer liability remains an option.[93]

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[89] The duty on PCBUs is to take steps to ensure, *so far as is reasonably practicable,* workplace safety. The duty on "officers" is to exercise *due diligence* to ensure the PCBU complies with its duties – a lower "minimum standard of behaviour" threshold.

[90] *Gibson v Maritime New Zealand*, above n 25, at [88] and [94]; and *WorkSafe v Neutze* [2020] NZDC 7872, at [108].

[91] For example, see *WorkSafe v Sproull* [2020] NZDC 25821: Mr Sproull, director of a small company, was charged as an officer for essentially obstructing WorkSafe's investigators.

[92] HSWA, s 32.

[93] See for example *Maritime New Zealand v South Taranaki Fishing Charters Ltd and Robins* [2024] NZDC 31563: Mr Robins was the sole director and shareholder – so an officer of the PCBU. But he was also the operator of the vessel and was charged as an "officer" primarily in relation to the control he exercised in that capacity (at [27]).

7.17. Finally, regardless of whether a person is charged as a PCBU or as an officer, the relevant offence is the same (s 48). As is the maximum penalty for an individual (s 48(2)(b)).

Availability of trust assets

7.18. The Majority misunderstands the nature of trustee indemnity rights, concluding that such rights are prohibited by s 29 of HSWA.[94] Consequently, it manufactures a contorted approach by which 'the trust' is held liable in order to find a way to justify payment of a HSWA fine out of trust assets –surmising the trustees are not individually liable (the trust is),[95] but the liability of "the trust" is enforced "against the individual trustees as the representatives of the trust."[96] This contortion again betrays the Majority's misconception of trusts as separate entities. It is also entirely unnecessary: the desired result – making trust assets answer a fine – can be reached by straightforward application of orthodox trust principles.

7.19. The (larger) topic of indemnities is dealt with below. In short, the appellants agree with Whata J that: (i) in principle, a trustee's common law and statutory rights of indemnity remain available in respect of a regulatory fine; and (ii) neither the text nor the purpose of s 29 of HSWA precludes the application of that indemnity.

8. Availability of trust assets to meet fine (indemnity)

8.1. Two questions arise: (i) as a matter of trust law, is a trustee entitled to be indemnified in respect of a fine (or reparation order)? (ii) If permissible as a matter of trust law, is it prohibited by s 29 of HSWA?

Availability of indemnity as a matter of trust law

8.2. Section 81 of the Trusts Act relevantly provides:

> (1) A trustee is personally liable for an expense or a liability incurred by the trustee when acting as a trustee.
>
> (2) However, a trustee who incurs an expense or a liability when **acting reasonably** on behalf of the trust **is entitled** –
>
> (a) if the trustee has paid the expense or discharged the liability out of the trustee's own funds, **to reimbursement** from the trust property; or
>
> (b) in any other case, **to pay the expense or discharge the liability directly** from the trust property (or to have it paid or discharged by a remaining trustee).

[94] Court of Appeal, at [47].
[95] *Ibid*, at [53].
[96] *Ibid*, at [51].

(3) The operation and enforcement of the indemnity in this section is governed by the rules of the common law and equity relating to trusts.

(4) This section does not limit any indemnity available at common law or in equity.

[Emphasis added]

8.3. The Trust Deed also provides at cl 20:

> No Trustees of these present shall be liable for any loss not attributable to **dishonesty or to the wilful commission** by the Trustees **of an act known to the Trustees to be a breach of trust** and shall be entitled to [be] indemnified out of the Trust Fund…

[Emphasis added]

8.4. Both s 81 and the Trust Deed entitle the Trustees to indemnification provided the relevant criteria are met – ie 'acting reasonably' and no 'dishonesty or wilful and knowing commission of a breach of trust.' Whether those criteria are met in this case is a factual question that cannot be answered definitively at this early stage. Precisely what the Trustees did or did not do and whether they were acting reasonably in doing so, are yet to be determined.

8.5. However, as a matter of principle, it is possible to address the question of whether equitable doctrine and/or s 81 permits a trustee to take an indemnity from trust assets for a fine. The appellant's position is that this is possible, at least in certain cases.

8.6. Trustee indemnities derive from three, potentially overlapping, sources: (i) equitable doctrine recognises a trustee's right to be indemnified for all costs and expenses properly incurred in the execution of the trust;[97] (ii) section 81 gives an indemnity for expenses or liabilities that a trustee incurs when acting reasonably; and a trust deed (refer [8.3] above). The justice of the indemnity was explained by Jessel MR in *Re Johnson*:[98]

> 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.

8.7. Each trustee's right to satisfy properly incurred liabilities from the trust assets is personal and individual, just as each trustee's liability is individual. The fact that one trustee has committed a breach of trust means that

[97] *Re Beddoe* [1893] 1 Ch 547, 558: "[A] trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses, properly incurred: such an indemnity is the price paid by *cestuis que trust* for the gratuitous and onerous services of trustees; and in all cases of doubt, costs incurred by a trustee ought to be borne by the trust estate and not by him personally. The words 'properly incurred' in the ordinary form of order are equivalent to 'not improperly incurred'."

[98] *Re Johnson* (1880) 15 ChD 548, at 552. See also *Gatsios Holdings v Kritharas Holdings* [2002] NSWCA 29, (2002) ATPR 44,795, at [41] (Mason P); *Carter Holt,* above n 16 at [33].

trustee's right to indemnification is reduced to the extent of any liability to restore the trust fund, but the indemnity right of other trustees who did not participate in that breach is not affected.[99]

8.8. The right permits trustees to pay expenses incurred in performing trust-related contracts, but it also entitles trustees to use trust funds to meet non-contractual liabilities, including (i) to pay damages to third parties in tort;[100] (ii) the costs of remediating contaminated land held in trust;[101] and (iii) liability for damages under consumer protection legislation.[102]

8.9. In the present case, the Court of Appeal's intuition (both the Majority and Whata J in dissent) was that any fines ought to be paid out of the trust assets. The appellants agree. Where a regulatory, strict liability, offence (under statutes like HSWA, the RMA or FTA) is committed in the course of operating a 'trust' business, it is appropriate that the trust assets should take the burden of the trustee's conduct, just as the trust would have taken the benefit. This position is consistent with the authorities regarding cognate legislation in Australia.[103]

8.10. For the purposes of this appeal, the Court need not decide whether trustees' indemnity is available in relation to fines for *all* criminal offending. It suffices to recognise that regulatory fines, imposed in relation to strict liability offences, qualify as expenses reasonably incurred by a trustee in the course of their duty.

8.11. That is consistent with equitable doctrine's traditional position that a trustee is entitled to indemnity unless there are circumstances that suffice to deny the right.[104] In cases of doubt, the trust estate should bear the cost[105] because "trustees ought not to be visited with personal loss on account of mere errors in judgment."[106] The tort cases demonstrate that the fact a trustee may have acted unreasonably or negligently vis-à-vis a third party (thus generating liability to pay damages) does not necessarily remove the trustee's right to be indemnified. The key is whether the trustee was acting

[99] *Re Frith* [1902] 1 Ch 342; *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36, [2023] AC 877 at [67].
[100] Eg, *Re Raybould* [1900] 1 Ch 199 (nuisance – letting down land in a way that injured adjoining land and buildings); *Benett v Wyndham* (1862) 4 De GF & J 259 (45 ER 1183) (personal injury – trustees arranged for trees to be cut and a bough hit and injured a vet who sued); and *Linaker v Pilcher* (1901) 17 TLR 256 (KBD) (libel claim brought against trustees of a trade union).
[101] *X v A* [2000] 1 All ER 490 (ChD).
[102] *Gatsios*, above n 98, (liability for misleading and deceptive conduct under the Trade Practices Act 1974 (Cth)).
[103] See *Safe Work NSW v Waycon Bulk Pty Ltd* [2015] NSWDC 254, (2015) 21 DCLR(NSW) 130 at [62]; *Solo Waste Aust Pty Ltd v McDonald* [2005] NSWIRComm 106, [(2005) 141 IR 332 at [24]-[25].
[104] *Nolan v Collie*, (2003) 7 VR 287, at [53].
[105] *Beddoe*, above n 97, at p 558 (Lindley LJ); *Nolan*, above n 104, at [46].
[106] *Ibid*, at 562 (Bowen LJ).

reasonably *vis-à-vis the beneficiaries* in doing the thing that incurred the liability.[107]

8.12. Accordingly, while the facts in this case are not yet established, nothing in trust law principles precludes a trustee's indemnity in the case of regulatory offending. The same test will apply – namely whether the trustee was acting properly vis-à-vis the beneficiaries.

Section 29, HSWA does not preclude trustee indemnity

8.13. Assuming the Trustees' indemnity is available as a matter of trust law, does s 29 of HSWA preclude it being applied in the case of a fine? The appellants say it does not. Section 29 relevantly 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
>
> …
>
> (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.
>
> …
>
> [Emphasis added]

8.14. Section 29 is not an absolute prohibition. While it precludes insuring against a *fine*, it permits insurance to cover *reparation* orders and *defence costs*. This point was not considered by the Majority. Thus, whatever s 29 says about fines, trustees are already permitted to be indemnified for reparation and defence costs.

8.15. The Majority held that s 29(2) would prevent trustees from being indemnified from the trust assets.[108] It rightly dismissed the High Court's conclusion that s 29 applies only to insurance policies: while s 29(1) is

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[107] *Nolan,* above n 104, at [53]-[55], [57].
[108] Court of Appeal, at [47].

confined to insurance, s 29(2) adds a series of broader prohibitions. Notwithstanding that, interpretive tools and the case law on s 29 (and s 56I of HSEA before) demonstrate that the focus of the prohibition has been primarily on insurance, rather than wider indemnities:

(a) The heading of s 29, which is relevant to its interpretation,[109] states "**Insurance against fines unlawful.**"

(b) The primary prohibition in s 29(1) is directed solely to insurance policies. In that context, the extended prohibitions in s 29(2)(b)-(d) are properly construed as a 'catch-all', to prevent circumvention of the primary prohibition (eg by using informal promises to indemnify, rather than insurances).

(c) A trustee's right of indemnity is such a fundamental aspect of trusteeship that, before it could be set aside, clear statutory language would be required.

(d) The health and safety cases that discuss s 29 (or 56I) do so exclusively with reference to insurance (not intra-party indemnities). The primary issue has generally been whether the existence of insurance cover to pay reparation is relevant to determining the amount of a fine. As Duffy J stated in *Department of Labour v Street Smart*:[110]

> By expressly prohibiting insurance against fines…but leaving open the ability to insure against the cost of reparation orders, Parliament has deliberately permitted employers to insure against reparation orders. That is an indication that Parliament does not disapprove of such insurance.

(e) The courts have endorsed the propriety of this kind of insurance: "an offender is not to be penalised because insurance cover has been arranged…"[111] Nor should businesses be discouraged from arranging insurance cover, which allows full reparation to be paid, by the court taking no recognition of that contribution when fixing the amount of the fine.[112]

8.16. The Majority held that a trustee's usual right of indemnity from the trust assets falls within the wider terms of s 29(2) because "…any creative

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[109] Legislation Act 2019, s 10.
[110] *Department of Labour v Street Smart Ltd* (HC HAM CRI-2008-419-0026, 18 August 2008) at [52] – [54].
[111] *Department of Labour v Hanham & Philp Contractors Ltd* (full HC, Christchurch, CRI 2008-409-0002, 18 December 2008) at [72].
[112] *Ibid,* at [73].

interpretation that seeks to avoid that implication fails to give effect to the clear terms and purpose of the legislation."[113] The Majority provides no explanation for why any other interpretation would run counter to HSWA. Respectfully, this analysis is misconceived.

Text of section 29

8.17. Considering the text of s 29, Whata J's analysis is correct.[114] Section 29 precludes one person from indemnifying *another person* against a fine. In the case of a company (one person) indemnifying a director (another person) that is what is happening. In the case of trust, it is not. The trustees own and deal with the trust assets. The trust does not exist as another legal person (like a company), so "it" is not indemnifying anyone. The word "indemnity" in the trust context is a misnomer. Properly understood, a trustee's indemnity is the right of a trustee to have recourse to the assets the trustee already legally owns, to meet debts/liabilities properly incurred by the trustee. Provided a trustee is acting in accordance with their duties, they are using their 'own' assets to pay the fine incurred in the course of executing their trustee duties. This is no 'sleight of hand.' It is an accurate reflection of the different nature of a trust arrangement compared to a company.

Purpose of s 29

8.18. The prohibition in s 29 has existed in health and safety legislation for more than 20 years (previously in s 56I of the HSEA). Notwithstanding that, it is a relatively unique provision.[115] In other contexts, there are qualified prohibitions against a *company* indemnifying *a director or employee* against liability.[116] But no prohibition exists in other more analogous regulatory statutes.[117]

8.19. The Law Commission observed that prohibitions against indemnification (like s 29) reflect the common law principle (*ex turpi causa non oritur actio*) that a party does not have the right to enforce performance of an agreement founded on a consideration that is contrary to public policy:[118]

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[113] Court of Appeal, at [47].
[114] Court of Appeal, Whata J (dissent), at [72].
[115] The same prohibition has since been introduced to the RMA (s 342A), but only in 2025. Consideration was given to inserting a similar provision in the FTA, but that proposal was abandoned by the Government late last year: Beehive announcement dated 17 November 2025.
[116] For example: Companies Act 1993, s 162; and Commerce Act 1986, s 80A.
[117] Such as the Building Act 2004, Credit Contracts and Consumer Finance Act 2003, Customs and Excise Act 1996, Conservation Act 1987, Wildlife Act 1953, or indeed the Crimes Act 1961.
[118] Te Aka Matua O Te Ture: Law Commission, *Pecuniary Penalties: Guidance for Legislative Design*, at [15.6].

> …where the act amounting to the offence is sufficiently serious or of such an anti-social character as to justify a refusal to allow an indemnity in the interest of the public, public policy should be invoked to deny cover to the assured.

8.20. The moral assessment inherent in this principle is referred to as a 'conscience test.'[119] Given the vagaries of morality, the courts have emphasised that the limits of this doctrine are as important as its application.[120] In its report on Pecuniary Penalties, the Law Commission observed that the conceptual differences between "conventional criminal offending" and regulatory/strict liability offending have led to a retreat from the position that any contravention of statute punishable by a monetary penalty is "always a reason to invalidate an indemnity."[121] This distinction has been repeatedly emphasised by the Courts. In *R v Collis*, Wylie J (dissent) contrasted cases involving "the breach of a regulatory offence not calculated to stir the public conscience" (to which the principle should not apply) with one involving the proceeds of "truly criminal activity with heavy penalties" (to which it should).[122]

8.21. The policy behind s 29 thus aligns with the common law/equitable principles of trustee indemnities (based on reasonable/proper conduct) canvassed above. In the context of a regulatory, strict liability offence, allowing a trustee to meet a fine from trust assets in accordance with their indemnity would not offend the purpose of s 29. It is consistent with the common law principle underpinning s 29, which recognises the distinction between such offending and 'truly criminal activity' which offends the public conscience. There is no reason to make life difficult by interpreting s 29 to exclude trustee indemnity in circumstances where neither the text nor the purpose of the prohibition calls for it. The appellants further endorse Whata J's comments that, to the extent this approach may be considered novel, it serves the statutory purpose while doing the minimum violence to orthodox principles of individual trustee liability.[123]

9. Caselaw

9.1. On its crucial finding – that a trust is a "body of persons…unincorporate" – the Majority relied heavily on this Court's decision in *Discount Brands v Westfield*[124] and the Court of Appeal's decision in *Cometa.*[125]

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[119] *R v Collis* (1990) 5 CRNZ 445 (CA) at 449. See also *R v Gibbons* (CA 75/99, 4 May 1999).
[120] *Collis*, above n 119, at 453.
[121] Law Commission - *Pecuniary Penalties*, above n 118, at [15.10].
[122] *Collis*, above n 119, at 463, per Wylie J (dissent).
[123] Court of Appeal, Whata J (dissent), at [73].
[124] *Discount Brands*, above n 60.
[125] *Cometa* (CA), above n 48.

9.2. *Discount Brands* involved a markedly different factual scenario. Discount had applied for resource consent to open a shopping centre. Northcote Mainstreet Inc, an incorporated society representing retailers and community organisations at the nearby Northcote shopping centre, opposed. Northcote Mainstreet was incorporated in 1993. Its registration lapsed in 2000 due to an oversight, but was restored in 2003. The result was that Northcote was technically unincorporated at the relevant time. Relevant to this case, was whether Northcote Mainstreet was a "person" "adversely affected" from whom written consent was required under s 94(2)(b) of the RMA. The RMA definition of "person" is the same as in HSWA.

9.3. All members of this Court agreed that Northcote Mainstreet was a "person" for the purposes of s 94(2)(b).[126] That was uncontroversial because: (i) "person" expressly included an unincorporated body of persons; and (ii) Northcote Mainstreet was all but incorporated (and only unincorporated because of a temporary lapse in registration). Consequently, it was unnecessary for the Court to (and it did not) consider what qualifies an 'unincorporated body of persons' more generally. Instead, the Court focused on the bigger issue of whether Northcote Mainstreet was a person "adversely affected." *Discount Brands* is entirely uninformative on: (i) what defines a "body of persons…unincorporate"; (ii) in any context outside of the RMA; and (iii) whether that includes a trust.

9.4. *Cometa* concerned a vessel owned by Cometa United Corporation (Panama) and managed by Tradewood Shipping Company (Italy) which had discharged oil into Lyttelton Harbour. The appellants were each charged with offences under the RMA as the "owners" of the vessel. The primary issue was whether Cometa and Tradewood were sufficiently identifiable legal entities such as to come within the definition of "person" in the RMA.

9.5. The District Court held Cometa and Tradewood were each legal entities and could be charged.[127] This was based on the entities having essentially conceded the point in commercial documents.[128] However, the Judge was

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[126] The Court disagreed on whether Northcote Mainstreet was "adversely affected" such that its written consent was required. The Majority considered only a person with a proprietary interest could be adversely affected. Elias CJ and Tipping J dissented, but for slightly different reasons.

[127] *Cometa* (DC CHCH CRN 05009502103, 9 March 2006, Judge Smith) at [3].

[128] Cometa was listed as the vessel's owner on the vessel registration, other international documents, and in documents submitted to Customs upon entry into New Zealand (see *Cometa* (DC) at [23]). Tradewood sent a letter to the Council accepting service of the summons issued to it, signed by a Mr De Sena "being an officer, agent and/or

buoyed in this finding by the express provision in the RMA for service and enforcement of any fine against the owner of a ship, against the ship's agent.[129]

9.6. In the High Court, Fogarty J held that it was not necessary to prove whether the defendants were "separate legal entities" or were incorporated. Each was operating as a distinct "body of persons" (in whatever form) – one as the owner, one as the manager – and it was sufficient to charge them on that basis.[130]

9.7. In the Court of Appeal, Fogarty J's analysis was seemingly accepted. The question on appeal was narrowed to whether a prosecution under the RMA can be brought against an "unincorporated body of persons."[131] Unsurprisingly, the Court held it can, because the definition of "person" in the RMA expressly includes an unincorporated body of persons.[132] That conclusion was supported by: (i) again, the existence of mechanisms in the RMA for service and recovery of fines (against the ship's agent) sufficient to overcome practical enforcement issues in relation to an unincorporated body;[133] and (ii) the fact that determining otherwise would leave a lacuna in the RMA in this specific context, where foreign vessels of uncertain legal ownership status are frequent visitors to New Zealand waters.[134] Neither of those factors is present in HSWA or this case.

9.8. For all the discussion of *Discount Brands* and *Cometa* in the lower courts, only two relevant points emerge:

(a) Despite not being a legal entity, an unincorporated body of persons can have a sufficiently discernible identity, separate from its members, to be recognised as a "person" for the purposes of specific legislation (the RMA). That is unsurprising given the definition expressly includes an unincorporated body.

(b) The finding that Cometa and Tradewood could each be charged as unincorporated bodies under the RMA, was sustained by the existence of specific provisions in that Act providing for alternative service and enforcement and the lacuna in enforcement that would

representative of, or legal counsel for Tradewood Shipping Company with the appropriate authority and authorisation to bind Tradewood Shipping Company in this matter." (see *Cometa* (DC), above n 127, at [26].)

129 *Cometa* (HC CHCH CRI 2006-409-000128, 6 October 2006, Fogarty J), at [36].
130 *Ibid*, at [70].
131 *Cometa* (CA), above n 48, at [7].
132 *Ibid*, at [26].
133 *Ibid*, at [26].
134 *Ibid*, at [28].

otherwise arise in that very specific context (foreign ships in New Zealand).

9.9. The appellants do not dispute those points. Via the same definition of "person," HSWA envisages that at least some form of unincorporated body may be charged under the Act. That must be given meaning. However, *Discount Brands* and *Cometa* say nothing – expressly or applicable by analogy – about: (i) whether a trust qualifies as an unincorporated body of persons, and (ii) in any context other than the RMA. Those cases are therefore of limited assistance.[135]

10. Conclusion

10.1. For this Court to accept the Majority's approach would come at considerable cost.

(a) It requires the Court to either invent a new form of 'personhood' (for a trust) or introduce a new concept of 'collective criminal liability' (for trustees) in New Zealand. Those concepts would not remain confined to HSWA. The relevant statutory definitions are generic, and the Court's approach would be just as applicable in other regulatory, if not civil, contexts. Recognising a trust as a discrete entity capable of being charged with an offence would necessarily lead to uncertainty and litigation about what else a trust can do/be held liable for in other contexts. That would upend the long-standing orthodox approach to trusts.

(b) In the criminal context, the Majority's approach would generate substantive and unnecessary practical and procedural issues. Significant guidance and/or legislative reform would be required to dovetail a new concept of a trust as a 'person' or collective liability of trustees, into a procedural regime premised on individual criminal liability. In the absence of that, court registry staff would be left in the difficult position of shoe-horning those concepts in by themselves. As Whata J identified, the end result is likely to be a devolution to individual identification/liability of trustees because the system is not set up to accept anything else.

[135] Of more relevance are *North v Commissioner of Inland Revenue* (1985) 7 NZTC 5,192 - in which the High Court expressly dismissed an argument that "person" included 'a trust' for the purposes of the Stamp and Cheque Duties Act 1971, and *WorkSafe v McRae* [2018] NZDC 22096 – the only known HSWA prosecution of a trust/trustee, in which WorkSafe prosecuted the trustee, rather than 'the trust'.

(c) The Majority's approach removes the ability to recognise distinctions between the conduct and culpability of individual trustees (in accordance with orthodox principles) and instead forces all trustees to bear collective liability for the actions of their co-trustees. That is a major, and grossly unfair, departure from traditional principle.

(d) While the Majority's approach seemingly achieves the instinctive aim of making trust assets available to meet a fine, it leaves unclear how that is supposed to work in practice. 'The trust' does not own trust assets, the trustees do. The Majority says the trustees would be compelled to ensure a fine against the trust is paid from trust assets,[136] but fails to appreciate that trustees are only permitted to do so via their right of indemnity. That indemnity only applies to liabilities incurred by the trustees personally. Holding 'the trust' itself liable would generate uncertainty about the application of the indemnity.

(e) The Majority's analysis – that if trustees are charged individually s 29, HSWA would preclude 'the trust' from indemnifying them in respect of fines – demonstrates its own absurdity: if 'the trust' is given personhood for the purposes of being charged and fined, then s 29 would preclude the trust (a person) from being indemnified by the trustees (as 'another person(s)') in respect of the trust's fine.

(f) The Majority's strained approach to ensure 'a trust' engages the higher maximum fine is self-defeating, and in reality, would lead to a lower cumulative maximum fine in many cases.[137]

10.2. As Whata J recognised in dissent,[138] the level of contortion in the Majority's approach is unnecessary to achieve Parliament's objective.[139] The orthodox approach endorsed by the appellants better serves HSWA's objectives, while avoiding violence to established trust principles and practical difficulties of criminal procedure. In this case:

(a) The Trustees should be prosecuted individually (but jointly per s 137 CPA) as the relevant PCBU(s). Even the limited facts available demonstrate the Trustees had different levels of involvement in the

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[136] Court of Appeal, at [51].
[137] In this case, for example, on the Majority's approach "the trust" would be subject to a maximum fine of $1.5m; but if the traditional principles of individual trustee/criminal liabilities are applied, the cumulative maximum penalty would have been $2.1m ($300,000 + $300,000 + $1.5m). Although Mr Roucher has since died.
[138] Court of Appeal, Whata J (dissent) at [60].
[139] HSWA, s 3.

Farm and health and safety. An individual approach allows those differences to be acknowledged in terms of any culpability. It is also consistent with HSWA's focus on 'control' – which both imposes, and limits, parties' duties based on the control they actually exert over a workplace.

(b) "Officer" liability remains available for trustees, for the reasons outlined from [7.15] above.

(c) Contrary to the Majority's view, individual prosecution of trustees would not permit 'a trust' to escape the higher maximum penalty in HSWA. Rather, it may result in a higher cumulative maximum penalty, whilst retaining flexibility to acknowledge different levels of culpability vis-à-vis the Trustees.

(d) Significantly, this orthodox approach fits within the existing criminal procedure framework premised on individual liability. None of the practical issues inherent in the Majority's approach would arise.

(e) Finally, the orthodox approach maintains recourse to the trust assets to pay a fine. The common law and statutory indemnities apply subject to the recognised limitations (ie for each trustee who did not act improperly). Section 29, HSWA, does not preclude that, either textually or as a matter of policy. Further, unlike the Majority's approach, if a trustee has not acted properly such that indemnification from the trust assets is not available, the fine could still be met from the Trustee's personal assets.

10.3. For all those reasons, the appeal should be allowed: a trust is not a "person" for the purposes of charging under HSWA. The trustees individually are the relevant PCBUs and appropriate defendants. If a different answer is to prevail as a matter of public policy, that is more appropriately a matter for Parliament (which is currently undertaking a further review of HSWA)[140] after wide consultation and a Law Commission referral.

Dated: 1 July 2026

A S Butler KC / S P H Elliott / M D Conaglen

Counsel for the appellants

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[140] Health and Safety at Work Amendment Bill 244-1.

Having made appropriate enquiries, counsel for the appellants certify that, to the best of their knowledge, these submissions do not contain any supressed information and are suitable for publication.