IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 32/2026

BETWEEN	**RH & JY TRUST** First applicant
AND	**JOCELYN YVETTE BROWN** Second applicant
AND	**PERPETUAL TRUST LIMITED** Third applicant
AND	**WORKSAFE NEW ZEALAND** Respondent

WORKSAFE NEW ZEALAND'S SUBMISSIONS ON APPEAL

Dated: 23 July 2026

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INTRODUCTION

1. This is a case about statutory interpretation. The issue is whether the Health and Safety at Work Act 2015's (**HSWA**) text and purpose enable a "person" and thereby "person conducting a business or undertaking" (**PCBU**) to include a trust or group of trustees conducting a business or undertaking.[1]

2. The majority in the Court of Appeal, Cooke and Palmer JJ (**Majority**), held that the answer is "yes".[2] Whata J dissented.[3] The crux of the appellants' appeal is that Whata J is correct, and that treating trustees collectively as one "person" is inconsistent with well-established trust law, which treats the trust as having no separate legal personality from the trustees.

3. WorkSafe New Zealand (**WorkSafe**) submits that the Majority is correct and that the appeal should be dismissed.

4. To repeat: this is an exercise in statutory interpretation. The focus is the HSWA's text and purpose. The HSWA's definition of "person" includes a "body of persons…unincorporate".[4] There is clear legislative intent that unincorporated bodies can be prosecuted.[5] The definition of PCBU is wide-ranging with specified exclusions.[6] No exclusion exists for trusts despite submitters having sought guidance on this issue.[7] The HSWA's silence on trusts cannot be taken as intent that they do <u>not</u> amount to PCBUs.

5. The Court of Appeal has held that an unincorporated group can be a "body of persons…unincorporate" and prosecuted under the Resource

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1 HSWA ss 16 and 17 **[Appellants' Authorities Bundle (AAB) Tabs 13 and 14]**.
2 [2026] NZCA 12 [**Court of Appeal Decision**] at [54] – [56] **[Casebook at 31]**.
3 At [57] and [80] **[Casebook at 32 and 40]**.
4 HSWA s 16 **[AAB Tab 13]**.
5 See paragraphs 21 – 25 below.
6 HSWA s 17 **[AAB Tab 14]**; see also *WorkSafe New Zealand v Dong SH Auckland Limited* [2020] NZHC 3368 at [29] **[RAB Tab X at X]** where the High Court said of the definition of PCBU "[s]pecified exemptions alleviate a wide-ranging definition."
7 Ministry of Business, Innovation and Employment *Health and Safety Reform Bill: Officials' Report to the Transport and Industrial Relations Committee Part B* (2015) at 19 **[RAB Tab X at X]**.

Management Act 1991 (**RMA**)[8] if it has "some form of internal structure which enables it to take and implement decisions as a collective".[9] The "collective decision-making" test remains appropriate in the context of the HSWA prosecutions of unincorporated groups: whether or not an unincorporated group's actions are the result of a collective decision has direct bearing on whether the HSWA should hold the group responsible as a "body of persons" or as separate individuals.[10]

6. Trustees of a trust meet the "collective decision-making" test and can be treated as a "body of persons" for HSWA purposes. Trustees have a default duty to act unanimously and cannot delegate their duties except under specified conditions.[11] Trustees' actions or failures to act can therefore result from their unanimous decisions. Conversely, a pattern of unilateral actions by a trustee may indicate improper delegation of duties by fellow trustees.

7. There is, accordingly, a basis to say that the ability to influence and control matters to which health and safety risks relate[12] lies with the group of trustees due to their unanimous decision-making or improper delegation of duties to one or more individuals of their group. That is, responsibility for trustees' actions or inactions (and consequent health and safety risks) does not necessarily lie with any one trustee but can lie with the group of trustees.

8. This provides the rationale to hold that the trustees who conduct a business or undertaking should be recognised as a "body of persons". As the Majority

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8 The RMA has the same definition of "person" as the HSWA **[RAB Tab X at X]**.

9 *Cometa United Corporation and Tradewood Shipping Company v Canterbury Regional Council* [2007] NZCA 560 [***Cometa* (CA)**] at [32] **[AAB Tab 49 at 586]**.

10 For an overview of the United Kingdom approach to determining whether an "unincorporated association" can be prosecuted, see *R v L* [2009] 1 All ER 786 [***R v L***] **[AAB Tab 51]**. WorkSafe submits that *R v L*, while containing useful commentary, is less of direct relevance because of possible interpretive differences between the terms "body of persons" (at issue in the present case) and "unincorporated association" (at issue in *R v L*). The case also does not address what distinguishes an informal grouping of persons from an "unincorporated association"– a key issue in the present case.

11 Trusts Act 2019 ss 38 and 67 – 73 **[RAB Tab X]**. The duty to act unanimously and non-delegation rule ("*delegatus non potest delegare*" – meaning "the delegated cannot delegate") exist in common law and pre-date the Trusts Act 2019: see, for example, *Rodeo Aero Club Inc v Moore* [1998] 2 NZLR 192 (HC) at 195 **[RAB Tab X at X]** and *Family property* (online looseleaf ed, Thomson Reuters) at TU67.01 **[RAB Tab X at X]**.

12 HSWA s 30(2) **[AAB Tab 16]**.

held, that "body of persons" can be referred to either as the "trust" or the trustees collectively.[13]

9. Recognising that trusts or trustees collectively can be a "body of persons", instead of being separate PCBUs, is consistent with HSWA purposes:[14]

9.1 The HSWA imposes higher maximum penalties for bodies of persons compared to individuals[15] due to the need for effective deterrence.[16] The HSWA also rejects form in the advancement of purpose.[17] Trustees conducting a business as a "body of persons" should not be able to hide behind legal form (namely, trust law's lack of recognition of a trust as an entity) to avoid the maximum penalty that applies to bodies of persons operating a business as a collective.

9.2 Officer duties[18] under the HSWA will generally only arise where the PCBU is a different legal entity from the officer.[19] As the Majority recognises,[20] only ever treating trustees as separate PCBUs runs the risk of failing to recognise that they may owe officer duties with respect to the business operating as a trust.

9.3 HSWA duties are framed so that failures to which multiple persons across the business have contributed can amount to the PCBU's breach of duty. Prosecuting trustees separately would likely impede the recognition of failures contributed to by multiple trustees.[21]

9.4 It stands to reason that fines against a business operating as a trust should be paid out of trust assets. However, s 29(2)(b) – (d) of the

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13 Court of Appeal Decision at [54] **[Casebook at 31]**.
14 Court of Appeal Decision at [26] **[Casebook at 20]**.
15 See HSWA ss 47(3)(c), 48(3)(c) **[AAB Tabs 20 - 21]** and 49(3)(c) **[RAB Tab X]**..
16 For general comments about the connection between high maximum penalties and deterrence in the context of corporate defendants, see Te Aka Matua O Te Ture: Law Commission, Report 133, *Pecuniary Penalties: Guidance for Legislative Design* at paragraph 1.09 **[AAB Tab 80 at 1142]**.
17 *WorkSafe New Zealand v Dong SH Auckland Limited* [2020] NZHC 3368 at [28] **[RAB Tab X at X]**.
18 HSWA s 44 **[AAB Tab 19]**.
19 See paragraph 53 below.
20 Court of Appeal Decision at [28] and [45] **[Casebook at 21, 28]**.
21 See paragraphs 56 – 58 below.

HSWA prevents one person from indemnifying "another person" for a fine. If a trustee in a multi-trustee trust is individually prosecuted, s 29(2)(b) – (d) would prohibit that trustee from seeking indemnity from trust assets because the other trustees who also hold the assets would qualify as "another person". By contrast, if the defendant is the trust or the trustees collectively, it can pay the fine out of trust assets without breaching s 29 because it (rather than "another person") holds the trust assets.[22] This provides for a fairer outcome.

9.5 Finally, prosecuting the trust or trustees collectively does not pose insuperable practical difficulties in terms of criminal processes such as service, plea, conviction or enforcement.[23] The charge would refer to the defendant as "the X trust" or "the trustees of the X trust collectively". Service can be against any one of the trustees on behalf of the trust, or through agreement, via their legal representative. Trustees will decide on the plea to be entered for the defendant using the usual decision-making processes required of them. The conviction would be entered against the defendant as named in the charge (it would not go in the trustees' own criminal records). If a fine imposed against the trust assets is not paid, it can be enforced against the trustees (who, in turn, would be indemnified out of the trust assets[24]) or by placing the trust in receivership.

22 For completeness, s 29(1) or (2)(a) of the HSWA is not relevant because it concerns the prohibition against policies or contracts of insurance **[RAB Tab X]**.

23 Notably, several trusts have been prosecuted and sentenced under the RMA under the same definition of "person"; counsel are not aware of any practical difficulty with service, plea, conviction or enforcement in those cases. See *Otago Regional Council v Bloem* [2010] NZRMA 322; *Otago Regional Council v Proffitt* DC Dunedin CRI-2010-012-001305 1 November 2010; *Otago Regional Council v Brian and Lorraine Family Trust* [2013] ELHNZ 221; *Otago Regional Council v Readale Trust* DC Dunedin CRI-2014-017-000130 26 May 2014; *Dunedin City Council v South Sea Trust* [2016] NZDC 1024. In those cases, the trust pleaded guilty **[RAB Tabs X - X]**.

24 As the Majority recognises at fn 27 of the Court of Appeal Decision **[Casebook at 30]**, s 29 of the HSWA would not bar trustee indemnity in the context of enforcing a fine that the trust or trustees collectively ordered to pay. That is because the fine itself was not against the trustee.

BACKGROUND AND OVERVIEW OF LOWER COURT DECISIONS

10. On 17 September 2020, a six-year-old boy was caught in a farm gate at a farm in Opotiki (**Farm**) and tragically died from his injuries.

11. The Farm is trust property of the RH & JY Family Trust (**RHJY**). The Farm's registered owners are RHJY's trustees who, at the time of the incident, were Jocelyn Brown, Phillip Roucher and Perpetual Trust Limited (**PTL**).

12. RHJY was established by a deed of trust dated 26 November 1999 (**Trust Deed**), which empowers the trustees to "expend invest and conduct business or trade in any manner … available to a natural person."[25]

13. Following an investigation, WorkSafe charged the sharemilker, Kellisa Farms Limited (**KFL**), as a PCBU under s 36(2) of the HSWA and RHJY as a PCBU under s 37 of the HSWA. In the alternative, WorkSafe filed separate charges against the three trustees under s 37 of the HSWA.

14. KFL pleaded guilty and was sentenced in 2022.[26] A dispute arose between WorkSafe and the remaining defendants as to whether RHJY could properly be charged as a PCBU. WorkSafe applied for a determination on this issue under s 147 of the Criminal Procedure Act 2011 (**CPA**).

15. In the District Court, Judge Bidos rejected WorkSafe's argument that a trust or, in the alternative, trustees collectively, can be a "person" under the HSWA.[27] His Honour would have dismissed the charge against RHJY.

16. WorkSafe appealed under s 296 of the CPA to the High Court. The question on appeal was: "can a trust (or its trustees collectively) meet the definition of "person" in s 16 of the [HSWA] which includes a "body of persons, whether corporate or unincorporate".[28] The High Court partially granted the appeal:

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25 Trust Deed cl 26 **[Casebook at 96]**.

26 *WorkSafe New Zealand v Kellisa Farms Limited* [2022] NZDC 2490.

27 *WorkSafe New Zealand v RHJY Trust* [2022] NZDC 2490 at [59] **[Casebook at 69]**.

28 *WorkSafe New Zealand v RHJY Trust* [2023] NZHC 3871 at [4] **[Casebook at 42]**.

Harvey J held that the trust was not a person who can be prosecuted under the HSWA but the trustees collectively were.[29]

17. RHJY, Ms Brown and PTL appealed to the Court of Appeal (Mr Roucher had passed away in the interim and the charge against him was withdrawn). The question on appeal to the Court of Appeal was: "[i]s a trust a 'person' under the [HSWA]" and "[c]an the trustees of a trust comprise a 'body of persons' within the definition of 'person' in the [HSWA]."[30]

18. The Majority (Cooke and Palmer JJ) answered both questions as "yes".[31] To summarise, the Majority held that:

    18.1 The definitions of "person" and "PCBU" extend to unincorporated bodies of persons.[32] The question is "who is conducting the business or undertaking as a matter of substance".[33] If a trust is the body of persons conducting the business or undertaking in fact and substance, then a trust can also be treated as a PCBU.[34]

    18.2 The duty under s 37 of the HSWA (allegedly breached in this case) concerns PCBUs who manage or control a workplace.[35] When a farm is held in and operated by a trust, "the trust undertakes the business as a matter of substance".[36]

    18.3 *Discount Brands*[37] and *Cometa*[38] establish that not every group of persons is a "body of persons" and whether a given group qualifies as a body "will depend on whether, as a matter of fact, that group engages in collective decision-making".[39]

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29 At [49] **[Casebook at 56]**.
30 Court of Appeal Decision at [56] **[Casebook at 14]**.
31 At [56] **[Casebook at 31]**.
32 At [17] **[Casebook at 17]**.
33 At [17] **[[Casebook at 17]**.
34 At [17] **[Casebook at 17]**.
35 At [18] **[Casebook at 17]**.
36 At [19] **[Casebook at 17]**.
37 *Discount Brands Limited v Westfield (New Zealand) Limited* [2005] NZSC 17 [***Discount Brands***] **[AAB Tab 50]**.
38 *Cometa* (CA) **[AAB Tab 49]**.
39 Court of Appeal Decision at [23] **[Casebook at 20]**. The Majority also referred in footnote 15 to *North v Commissioner of Inland Revenue* (1985) 7 NZTC 5 (HC) **[AAB Tab 75]**. This case

18.4 The HSWA "makes a distinction between duties on individuals who make workplace decisions, and the duties on a collective body that does so":[40] it imposes different penalties if duties are breached by a body of persons rather than an individual.[41] Further, a "body of persons" gives rise to separate duties on "officers" of the body.[42]

18.5 A trust's existence will likely involve a presumption of collective decision-making by trustees but this will be a question of fact.[43]

18.6 The factual material in the present case available to Their Honours was "consistent with the existence of collective decision-making".[44] There was "a basis for the Crown to allege that the relevant decision-making was made collectively by the trustees",[45] not by individuals.

18.7 Treating trustees as individual PCBUs would not allow the HSWA to work as intended because it would prevent the maximum penalty for collective decision-making bodies from being available for trusts[46] and preclude officer liability for trustees.[47] Further, s 29(2) would prevent a trustee who is fined from being indemnified by trust assets.[48] These problems would be avoided if the relevant PCBU is the collective of trustees.[49]

18.8 Enforcement does not pose any particular issue. If a trust is liable to pay a penalty, the penalty can be enforced as trustees would be obliged to ensure that the trust's obligations were met.[50]

found that a trust was not a person for the purpose of stamp duty. The Majority (like the High Court) distinguished this case given the different statutory setting.

40 At [26] **[Casebook at 20]**.
41 At [26] **[Casebook at 20]**.
42 At [26] **[Casebook at 20]**.
43 At [29] **[Casebook at 22]**.
44 At [30] **[Casebook at 22]**.
45 At [30] **[Casebook at 22]**.
46 At [41] **[Casebook at 26]**.
47 At [45] **[Casebook at 28]**.
48 At [48] **[Casebook at 29]**.
49 At [49] **[Casebook at 29]**.
50 At [52] **[Casebook at 30]**.

18.9 The label "trust" can be used for the "body of persons" comprising the trustees (this issue being semantic); relevantly, trustees would not be the defendants in any individual capacity in any case.[51]

19. Whata J dissented.[52] Briefly, His Honour agreed with the High Court that a trust cannot be a person but a group of trustees may be described as a "body of persons"; however, absent express words, His Honour declined to interpret the HSWA as derogating from the long-standing law on trusts and trustee liability.[53]

WORKSAFE'S SUBMISSIONS

The issue is one of ordinary statutory interpretation

20. WorkSafe submits that the Majority correctly described the critical task as "identifying the meaning of the legislation from its text in light of its purpose and context [and] [t]hat is so of statutes that create criminal offences as much as any other kind of statute".[54]

Definition of persons and PCBUs extends to unincorporated bodies of persons

21. Section 16 of the HSWA defines "person" as:

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

22. Section 17 of the HSWA incorporates this definition when it defines a PCBU, as a "person conducting a business or undertaking".

23. Logically, this means that a PCBU can be a "body of persons unincorporate" conducting the relevant business or undertaking and so can be criminally liable under the HSWA for a breach of duty.

24. The legislative history of HSWA shows that Parliament intended this:

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51 At [54] **[Casebook at 31]**.
52 At [58] **[Casebook at 32]**.
53 At [57] – [58] **[Casebook at 32]**.
54 Court of Appeal Decision at [14] **[Casebook at 15]**, citing s 10(1) of the Legislation Act 2019 **[AAB Tab 22]**.

24.1 The Health and Safety Reform Bill (**Bill**) did not initially define "person". Clause 48 of the Bill provided that an unincorporated association does not commit an offence under the HSWA for failing to comply with a duty.[55] This aligned with the position under the Australian Model Work Health and Safety Act 2011.[56]

24.2 In a deliberate departure from the Australian position, the Select Committee recommended adding the above definition of "person"[57] and removing cl 48 as it was "not consistent with New Zealand common law, which recognises that in some cases unincorporated bodies can be prosecuted."[58] It is likely that the Select Committee's reference to "New Zealand common law" was a reference to *Cometa*.

25. The Select Committee's comments are a clear indication of statutory intent that unincorporated bodies lacking separate legal status are "persons" who can be prosecuted under the HSWA. This counters the appellants' submission that "[c]riminal liability is individual"[59] or attempts to show that individuals and body corporates "are the only legal entities envisaged by the CPA as capable of being convicted and sentenced."[60]

What is intended by a "body of persons…unincorporate"?

26. The issue is then what is intended by a "body of persons unincorporate" in the HSWA context and does it extend to trusts or trustees collectively.

27. As to what is intended, the s 17 definition of PCBU includes a "person conducting a business or undertaking…whether the person conducts a business or undertaking alone or with others." The Explanatory Note to the Bill suggests the reference to persons conducting a business or undertaking with others was included with unincorporated bodies in mind: "The definition clarifies that a person may be a PCBU for the purposes of the Bill whether the person conducts a business or

55 Health and Safety Reform Bill 192-1 at 50 **[AAB Tab 36 at 74]**.

56 Australian Model Work Health and Safety Act 2011 s 34 **[RAB Tab X]**.

57 Health and Safety Reform Bill as reported from the Transport and Industrial Relations Committee 192-2 at 28 **[AAB Tab 37 at 128]**.

58 At 9 **[AAB Tab 37 at 83]**.

59 Appellants' submissions at paragraph 4.8.

60 At paragraph 4.8(a) and (b).

undertaking alone or with others (for example, as a partner in a partnership or joint venture)." [61]

28. Further, the (connected) definition of "officer" in the HSWA provides that "if the PCBU is…a body corporate or an unincorporated body, other than a company, partnership, or limited partnership" an officer will be "any person occupying a position in the body that is comparable with that of a director of a company."[62]

29. Two points can be made:

29.1 Lack of incorporation does not mean that the persons comprising the body must be treated as separate persons conducting the business or undertaking, if they qualify as a "body of persons…unincorporate". Legal form is not determinative.

29.2 Partnerships and joint ventures are just "examples" and not intended to be a comprehensive list of the types of bodies of person unincorporate. The HSWA thereby contemplates unincorporated bodies beyond partnerships and joint ventures and does not attempt to delimit the list of unincorporated bodies (consistently with the open-ended definition of PCBU).[63]

30. As the Majority observed, the correct question is "who is conducting the business or undertaking as a matter of substance."[64]

31. It is accordingly submitted the various common law authorities that the appellants have cited as authority that "a trust is not a legal entity" [65] do no more than state the obvious (as the Majority noted).[66] It is equally obvious

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61 Health and Safety Reform Bill 192-1 at 6 **[AAB Tab 36 at 73]**.

62 HSWA s 18(a)(iv) **[AAB Tab 15]**.

63 See also the Court of Appeal (UK)'s observation in *R v L* at [33] that an unincorporated association which can be prosecuted does not have to be "for all purposes the same as a company or other corporation" **[AAB Tab 51 at 659]**.

64 Court of Appeal Decision at [17] **[Casebook at 17]**.

65 Appellants' submissions at paragraph 3.2 citing, among several cases, *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7, [2019] AC 271 at [59(i)] **[AAB Tab 38]**.

66 Court of Appeal Decision at [17] **[Casebook at 17]**.

that the orthodox position can be shifted by statute.[67] Those authorities are not therefore relevant to answering whether, for HSWA purposes, the trustees of a trust can be a "body of persons" who conduct the business or undertaking. A more nuanced inquiry is required.

32. It is respectfully submitted that Whata J is not correct that only express words[68] in the HSWA could indicate Parliamentary intent that trusts or trustees collectively can qualify as a PCBU. This is because:

32.1 PCBU has a deliberately wide-ranging definition,[69] providing specific lists of what is **not** included. Trusts are not excluded.

32.2 Relatedly, Parliament did not exclude trusts despite submitters seeking guidance on the point at the Select Committee stage.[70] The Ministry of Business, Innovation and Employment's recommendation to the Transport and Industrial Relations Committee was that no change was needed and it was the regulator's function to prepare guidance.[71] The choice not to address trusts and leave it to the regulator undermines the argument that the HSWA's silence on trusts shows that the trust law position is maintained.

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67 Several statutes have expressly included a trust as a "person": see, for example, Overseas Investment Act 2005, s 7(2)(f) (definition of "overseas person") **[AAB Tab 25]**; Tax Administration Act 1994, s 3(b) (definition of "offshore person") **[AAB Tab 31]**; Ngati Tama Claims Settlement Act 2003, s 11(3)(c) **[AAB Tab 24]** and Ngati Ruanui Claims Settlement Act 2003, s 14(4)(c) (definition of "representative entity") **[AAB Tab 23]**. Several other statutes have expressly included trustees collectively as a person: see, for example, Goods and Services Tax Act 1985, s 2 (definitions of "person" and "unincorporated body") **[RAB Tab X]**; Customs and Excise Act 2018, s 134(5) and (6) (definition of "unincorporated body of persons" **[RAB Tab X]**; Child Support Act 1991, s 2 (definition of "unincorporated body of persons") **[RAB Tab X]**; Income Tax Act 2007, s HC2 (trustees of trust are treated "as if they were a single notional person") **[RAB Tab X]**; Income Tax Act 2007, s RE 30 (references to "body" and "unincorporated body" as "trustees of a trust") **[RAB Tab X]**.

68 Court of Appeal Decision at [57] **[Casebook at 32]**.

69 *WorkSafe New Zealand v Dong SH Auckland Limited* [2020] NZHC 3368 at [29] **[RAB Tab X at X]** where the High Court said of the definition of PCBU "[s]pecified exemptions alleviate a wide-ranging definition."

70 Ministry of Business, Innovation and Employment *Health and Safety Reform Bill: Officials' Report to the Transport and Industrial Relations Committee, Part B* (2015) at 19 **[RAB Tab X at X]**.

71 At 19 **[RAB Tab X at X]**.

Ability to collectively make binding decisions is key to the existence of a "body"

33. Not every unincorporated group can qualify as a "body of persons". All three Judges turned to common law to determine how to distinguish between those which qualify and those that do not. There was a difference of approach between the Majority and Whata J as to the relevant test:

33.1 The Majority followed the approach in *Cometa* focusing on the ability of the body to make decisions collectively.[72] Their Honours also relied on *Discount Brands* as authority that "[t]he concept of person is clearly designed to go beyond legal persons" and that "[i]t is necessary to be able to identify a body, but not a body which is legally recognised in its own right."[73]

33.2 Whata J's view – informed by His Honour's perspective that the very nature of trusts precluded them being treated as a "person"[74] – was that the appropriate approach, based on the majority in *Discount Brands*, focuses on whether the unincorporated group had distinct rights and interests from those of the individuals comprising it.[75]

34. It is submitted that the "collective decision-making" test in *Cometa* is more appropriate in the HSWA context because:

34.1 While both *Discount Brands* and *Cometa* concerned the definition of "person" in the RMA, *Cometa* did so in the context of criminal liability.

34.2 The question of distinct rights and interests may well be relevant when considering who is adversely affected in a planning and notification context (and especially in the context of s 94 of the RMA), but not necessarily for the purposes of criminal liability arising from the conduct of an unincorporated group. WorkSafe submits that there is a logical rationale for adopting the "collective decision-making" test to determine who is a "body of persons…unincorporate"

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72 Court of Appeal Decision at [23] **[Casebook at 20]**.
73 At [20], quoting Tipping J in *Discount Brands* at [170] – [171] **[Casebook at 18]**.
74 At [63] **[Casebook at 34]**.
75 At [66] – [69] **[Casebook at 35]**.

in the HSWA. If a group's actions (or failure to take action) in respect of matters affecting health and safety are determined via collective decision-making, it is only fitting to treat that group as one "body" for the purposes of any ensuing criminal liability under the HSWA.[76]

35. The appellants in their submissions propose "agency" as the correct test for establishing whether there is a "body of persons" in this context, arguing that "agency is what gives a body of persons a coherent identity beyond the mere sum of those who are, for the time being, members".[77] However, the appellants cite no clear authority for this proposition, as might be expected for so fundamental a conceptual underpinning.[78]

36. It is submitted that the Majority's adoption of the "collective decision-making" test better reflects existing case law and the HSWA's purpose.

Trustees of a trust meet the "collective decision-making" test

37. The Majority held that "whether the correct defendant is a trust will depend on whether, as a matter of fact and in substance, the relevant business is being managed through the collective decisions of the trustees, rather than by individuals."[79] The existence of a trust "will likely involve a presumption that collective decision-making by the trustees is involved".[80]

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76 In *R v L* the English Court of Appeal did not specifically address what defines a "body of persons". However, in reasoning that the relevant club was capable of prosecution under a regulatory statute it held that "many unincorporated associations 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" (at [14]) **[AAB Tab 51 at 653]**. Later, the Court stated that "[i]t is a necessary consequence of the different nature of an unincorporated association that all its members remain jointly and severally liable for its actions done within their authority" (at [33]) **[AAB Tab 51 at 659]**. The Court went on to note that it is for the Crown to determine whom it seeks to prosecute – whether that is the unincorporated body or its constituent members (at [35]) **[AAB Tab 51 at 659]**. Without endorsing this approach as necessarily being the correct one for the HSWA, WorkSafe submits that if this approach were applied, the same reasoning would enable prosecuting trustees of a trust collectively under the HSWA. In substance third parties understand they are dealing with a trust, not just individual trustees. Each trustee would, in theory, be capable of being prosecuted separately for the same offence, thereby satisfying the requirement in *R v L* that the members of an unincorporated association remain jointly and severally liable for the same offence.

77 Appellants' submissions at paragraph 6.4.

78 *R v L* **[AAB Tab 51]**, which the appellants cite, contains no suggestion that "agency" is relevant to deciding when unincorporated associations can be prosecuted.

79 Court of Appeal Decision at [29] **[Casebook at 22]**.

80 At [29] **[Casebook at 22]**.

38. It is submitted the Majority is correct because:

38.1 Trustees have a default duty to act unanimously[81] and, outside specified conditions,[82] "cannot delegate [and] must all perform the duties attendant upon the execution of a trust."[83] The result is that where trustees conduct a business together, it is possible to attribute actions (or failure to take actions) to unanimous decisions of the trustees. Conversely, a pattern of unilateral actions by one trustee may indicate improper delegation of duties by the fellow trustees. In either case, the responsibility lies not just with an individual trustee but the group of trustees.

38.2 Trustees legally own trust property. Where the trust property is (as in this case) farmland, all trustees are owners who, at least on the face of it, have the ability to influence and control the risks on the land. There is, accordingly, a basis to say that the ability to influence and control matters to which health and safety risks relate[84] lies with the group of trustees due to their unanimous decision-making (or due to the improper delegation of duties to one or more individuals of their group). In other words, any health and safety consequences from trustees' actions or inaction do not necessarily lie with any one trustee but lies instead with the group of trustees. This is, it is submitted, a compelling reason to depart from the traditional trust law position that trustees are only individually liable for their actions.

38.3 Different trustees will likely have different levels of involvement in the conduct of the business, as the appellants note.[85] But that does not mean that one trustee should be singled out for responsibility for key decisions or actions given the (albeit varying levels of) input of all trustees. The more appropriate outcome is to target the trustees collectively or the trust (without risk of individual convictions for

81 Trusts Act 2019 s 38 **[RAB Tab X]**.

82 See fn 11 above.

83 *Rodeo Aero Club Inc v Moore* [1998] 2 NZLR 192 (HC) at 195 (Hammond J) **[RAB Tab X at X]**.

84 HSWA s 30(2) **[AAB Tab 16]**.

85 Appellants' submissions at paragraph 10.2(a).

trustees or personal liability for the fine without recourse to trust assets[86]). This provides the rationale to hold that the trustees who conduct a business or undertaking together should be recognised as a "body of persons".[87]

38.4 As the Majority held, that "body of persons" can be referred to either as the "trust" or the trustees collectively.[88]

39. The appellants argue that "trustees do not make trust decisions as a collective", saying that they "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)."[89] It is respectfully submitted that this is a misinterpretation of *Cometa* and the Majority's reasoning: neither suggests that a group has to be able to make decisions as "a single unit"; that is not the intent behind the word "collective". Rather, the group only needs to have an internal structure to take and implement decisions as a collective (that is, on behalf of the members of the group). Trustees have a duty to act unanimously, whatever the internal processes for discussing the course of action. The appellants acknowledge that the "[t]rustees must agree unanimously on action regarding trust assets, and their decisions taken together dictate what action is taken."[90] It is precisely this ability to make what is, in substance, a collective decision that is binding all trustees (and made in pursuit of a

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86 As to why trustees would be personally liable for the fine without recourse to trust assets, see the submissions addressing the effect of s 29 of the HSWA at paragraph 58 below.

87 For the avoidance of doubt, WorkSafe agrees with the Majority (at [29]) [**Casebook at 22**] that whether the trust or trustees collectively should be prosecuted, or whether an individual trustee should be prosecuted, will depend on the facts. In cases where the trustee's involvement in running the business is such that in reality they are conducting the business or undertaking, the trustee could properly be charged as a PCBU (for example, *WorkSafe New Zealand v McRae* [2018] NZDC 22096 **[AAB Tab 76]** and *WorkSafe New Zealand v Dibble* [2019] NZDC 99728 **[RAB Tab X]**). In cases where the trust or trustees collectively are conducting the business, *and* there are also personal failures by the trustees, both the trust as a collective and the trustees as individuals can potentially be prosecuted, the latter for failing to meet their due diligence obligations as officers under s 44 of the HSWA **[AAB Tab 19]**.

88 Court of Appeal Decision at [54] **[Casebook at 31]**.

89 Appellants' submissions at paragraph 7.8.

90 At paragraph 7.8.

common purpose[91]) which characterises a "body of persons" according to *Cometa*.

40. The appellants' comparison with the decision-making for boards of directors is unproductive:[92] they say that directors vote on decisions for the company and, taken collectively, those decisions become the company's decision – a discrete entity from the board.[93] The point they appear to be making is that trustees resemble the board of directors and each remains responsible for their own decision and can be personally liable if they breach their duties. However, that is not a valid basis to argue that trustees collectively cannot be a "person" given that the definition of "person" in HSWA expressly includes bodies of person unincorporate who (unlike a company) have no such discrete legal existence.

41. The fact that trustees are duty-bound to act unanimously by default and cannot delegate their duties makes it appropriate that individual trustees are not singled out for liability in circumstances where they take what is in substance a collective action.

42. One matter deserves clarification: WorkSafe had previously argued that a trust comprises a body of persons consisting of the trustees, settlor and beneficiaries, meaning that a single trust trustee still has a body of persons. The Majority rejected this argument, noting that "[t]he relevant body of persons will comprise those who make the business decisions, including the workplace decisions"[94] – that is, the trustees. As a result, where there is only one person making the decision (that is, a single trustee), there is no body of persons. WorkSafe accepts the Majority is correct.

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91 See Trusts Act 2019 s 13(a) **[AAB Tab 33]**, describing an express trust as "a fiduciary relationship in which the trustee holds or deals with trust property for the benefit of the beneficiaries or for a common purpose."

92 Appellants' submissions at paragraph 7.8.

93 At paragraph 7.8.

94 Court of Appeal Decision at [29] **[Casebook at 22]**.

Substance over form

43. WorkSafe relatedly submits that the Majority is correct in holding that "[w]hen a decision is made to transfer a farm to a trust, or establish a trust to own and operate a farm, the trust [that is, the trustees collectively] undertakes the business as a matter of substance":[95]

    43.1 Trustees incur expenses for the trust using the trust assets which they hold together (or being indemnified from those assets after incurring the expenses).[96] When trustees are operating a business, this may include expending money for the business using trust funds.

    43.2 Business revenue would be "trust income"[97] that the trustee retains as trust property or vests in the beneficiary – in either case, in accordance with the trust's terms.[98]

44. In other words, in the HSWA context it is artificial to treat trustees as separate PCBUs because of their traditional legal form in trust law when, as a matter of substance, they are using the same "pot of money" to run the same business, in pursuit of the same, common objective(s).

45. Whata J's view was that "[i]ndividual trustees, and only individual trustees, 'conduct' business using trust assets in law and fact"[99] and this was "a matter of substance, not form."[100] However, with respect, His Honour's reasoning places undue weight on the orthodox legal position in trust law without allowing for a closer examination of the substance in accordance with the HSWA. His Honour distinguishes the unincorporated bodies held to be a "person" in *Cometa* on the basis that they, unlike a trust, "enjoyed a form of juridical personality that was separately cognisable at law, including for the purpose of suit."[101] By contrast, His Honour held that "a trust does not

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95 At [19]. See also [28] **[Casebook at 17 and 21]**.
96 Trusts Act s 81(2) **[AAB Tab 35]**.
97 The marginal note to HC5 – HC8B of the Income Tax Act 2007 **[RAB Tab X]** uses this wording.
98 Income Tax Act 2007 HC5 – HC7 **[RAB Tab X]**.
99 Court of Appeal Decision at [63] **[Casebook at 34]**.
100 At [63] **[Casebook at 34]**.
101 At [65] **[Casebook at 34]**.

qualify because it has no independent existence from the individual trustees that comprise it."[102] It is submitted this reasoning presupposes legal recognition of a body separate from the individuals who comprise it for there to be a "body of persons" – but fails to answer whether the HSWA's purpose and scheme supplies that recognition for the trustees of a trust.

46. The appellants seek to distinguish trusts from other types of unincorporated bodies such as friendly societies, which they say are more in line with the "pseudo-corporate" structure contemplated in *Cometa*.[103] It is submitted this distinction is overstated because:

    46.1 As long as there is sufficient internal structure to make a decision and implement it as a collective (which trustees have due to their duty to act unanimously), there is a "body of persons" as per *Cometa*.

    46.2 The fact that trusts have different structures to companies or friendly societies goes without saying and cannot be decisive. In *R v L*, the Court of Appeal of the United Kingdom observed: "Although many statutes make it possible to prosecute an unincorporated association, and although we have held that this is perfectly possible under s 85 of the 1991 Act, it does not follow that such an association is for all purposes the same as a company or other corporation. It is not."[104]

47. The Majority, having found that trustees collectively meet the test of "collective decision-making" for a "body of persons", observed that "it would be surprising if the particular legal structure used to own and operate the farm [trust, company or partnership] significantly altered the content of the duties, and the penalties flowing from the breach of those duties."[105]

48. It is submitted this must be correct. As noted by the Majority, citing the reasoning of Downs J in *Dong SH*, the HSWA emphasises substance over

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102 At [65] **[Casebook at 34]**.

103 Appellants' submissions at paragraph 4.11.

104 *R v L* at [33] **[AAB Tab 51 at 659]**. In that case, a 900-odd member golf club was found criminally liable for failing to maintain a tank.

105 Court of Appeal Decision at [33] **[Casebook at 24]**.

form.[106] The legal form of the trust structure (that the common law recognises trustees as separate legal persons) should not conclusively determine or override the substance (namely, that trustees are capable of collective decision-making that binds all trustees, therefore operate as one "body of persons", and should be subject to the penalties and duties that apply to such bodies of persons).

Availability of maximum penalties is appropriate

49. The Majority considered it "contrary to Parliament's intent to conclude that the maximum penalty in s 48(2)(c) is not available when the collective decision-making body is a trust rather than a company, partnership or similar body", describing such a distinction as "arbitrary and inconsistent with the all-embracing nature of the definition of person, and the intended reach of the Act."[107]

50. It is submitted this is also correct:

50.1 The HSWA has a primary public protection purpose.[108] Interpreting the HSWA as only enabling trustees to be prosecuted separately undermines effective deterrence by removing access to the higher maximum fines available for a body of persons conducting a business.

50.2 The maximum fine against a body of persons exceeds the sum of the separate maximum fines available against four individual PCBUs.[109] In some cases, such as the present, the presence of a corporate trustee may result in the sum of separate maximum fines being higher than one fine imposed on one body of persons. However, this possibility does not detract from the general premise that there would *generally*

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106 Court of Appeal Decision at [28] **[Casebook at 21]**; *Dong SH Auckland Limited* [2020] NZHC 3368 at [29] **[RAB Tab X at X]**.

107 Court of Appeal Decision at [41] **[Casebook at 26]**.

108 HSWA s 3(1)(a) and (2) **[AAB Tab 12]**; *Dong SH Auckland Limited* [2020] NZHC 3368 at [29] **[RAB Tab X at X]**.

109 The maximum fines specified for "any other person" in HSWA ss 47(3)(c), 48(3)(c) **[AAB Tabs 20 and 21]** and 49(3)(c) **[RAB Tab X]** are five times higher than the maximum fines specified for individuals who are PCBUs or officers under HSWA ss 47(3)(b), 48(3)(b) and 49(3)(b) respectively.

be a higher maximum fine where a trust or trustees collectively are prosecuted, with an accompanying greater deterrent effect.

51. The risk of unfairness is limited because:

51.1 By the Majority's approach, a single trustee trust would not be a "body of persons" unincorporate and hence would remain subject to the lower maximum fine for individuals who are PCBUs.[110]

51.2 Whata J provides the example of small family trusts with no assets but the family home, and says that allowing for a higher maximum fine against them would be unfair.[111] However, downward adjustments for financial capacity are common practice in HSWA sentencing and can adequately deal with this possibility.[112] The existence of small family trusts does not justify denying access to the highest maximum fine against the entire category of businesses operating as trusts, many of which may well be asset rich.

Availability of officer liability is appropriate

52. The Majority considered that a business operating as a trust places the trustee in a position that meets the definition of "officer", namely, "any person occupying a position in the [unincorporated] body that is comparable to with that of a director of a company".[113] A further reason why the appellants' approach undermined the legislative intent was that "there is only one kind of potential liability – for the trustees as individuals – and any liability as an officer does not arise".[114]

53. WorkSafe agrees with the Majority that if individual trustees can only be charged as PCBUs, it would be artificial (if not impossible) to charge that trustee as an officer:

[110] Court of Appeal Decision at [29] **[Casebook at 22]**.
[111] At [77] **[Casebook at 39]**.
[112] Sentencing Act 2002 s 40 **[RAB Tab X]**; see, for example, *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 at [24] **[RAB Tab X at X]**; *Maritime New Zealand v South Taranaki Fishing Charters Limited* [2025] NZDC 28583 at [26](d) **[RAB Tab X at X]**.
[113] Court of Appeal Decision at [44] **[Casebook at 27]**.
[114] At [44] **[Casebook at 27]**.

53.1 Although the same person can hold multiple duties, the definition of PCBU "does not include…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."[115]

53.2 The due diligence duties on officers under s 44 would make little sense if the officer and the PCBU were legally one and the same person (unlike, for example, a director and their "one-man band" company, who are legally separate persons). Section 44(1) provides that "[i]f a PCBU has a duty or an obligation…an officer of the PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation". While, as noted by Gault J in *Gibson*,[116] PCBU and officer duties are separate and should not be conflated, it is difficult to envisage how a natural person could properly be charged as officer for failing to exercise due diligence to ensure that they, as a (legally identical) PCBU, comply with their duty.[117]

53.3 If trustees are separate PCBUs, a trustee cannot count as an officer for another trustee because "officer" is defined in terms of the same PCBU. The result is a siloed approach to each trustee without recognising that in substance, they conduct the same business.

54. The Majority is also correct that a trustee holds a position that, in the context of a business operating in a trust, meets the "officer" definition. The appellants criticise the Majority's analogy of a trustee to a director[118] but this overlooks a trustee occupies a position in relation to the business operating as a trust that will generally allow the trustee "to exercise significant influence over the management of the business or undertaking (for example,

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115 HSWA s 17(1)(b)(i) **[AAB Tab 14]**.

116 *Gibson v Maritime New Zealand* [2026] NZHC 813 at [88] and [94] **[AAB Tab 48 at 520, 522]**.

117 For example, s 44(4)(c) of the HSWA [**AAB Tab 19]** requires the officer to ensure the PCBU has available for use appropriate resources. If the trustee is the PCBU, the trustee's resources **<u>are</u>** the PCBU's resources. This can be contrasted with a one-director company, where the company is legally a distinct entity from the director, with separate assets, and therefore may not automatically have the same resources as the director.

118 Appellants' submissions at paragraph 7.15.

a chief executive)".[119] A trustee is not a person "who merely advises or make recommendations" (who is excluded from being an "officer'),[120] rather, they hold decision-making power and legally own and influence and control trust assets with the other trustees.

55. The appellants' position that trustees can only be separate PCBUs therefore undermines the scope to recognise officer duties for trustees. By contrast, interpreting a trust or trustees collectively to be a "body of persons" makes it possible to treat trustees as having officer duties. Not only is this an appropriate reflection of the position that trustees hold in the business, it promotes improved health and safety outcomes for trusts by recognising that trustees must exercise due diligence to ensure that the trust or trustees collectively meet their obligations as PCBU under the HSWA.

Better recognition of failures contributed to by multiple trustees

56. WorkSafe submits that finding a trust or trustees collectively to be a "person" and PCBU also enables better recognition of systemic issues with workplace safety. HSWA duties are framed in such a way that systemic failures (to which multiple persons across the business may have contributed) can (and often do) amount to a breach of duty by the PCBU. Prosecuting each trustee separately would likely impede the recognition of systemic failures to which multiple trustees have contributed:

56.1 If the trust or trustees collectively were a "person", each trustee's state of mind and conduct can be attributed to the "collective" body under ss 160(2) and 161(2) of the HSWA. This would result in better recognition of the business's collective knowledge and conduct. However, it seems unlikely that one trustee's state of mind or conduct can be attributed to another if each trustee were treated as separate PCBUs.[121]

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119 HSWA s 18(b) **[AAB Tab 15]**.
120 Section 18((d) **[AAB Tab 15]**.
121 See more detailed discussion of this point at paragraph 58 below.

56.2 Trustees collectively may be able to influence and control more of the matters to which work related risks relate than any one trustee on their own. If trustees can only be prosecuted separately, charges would likely have a more compartmentalised focus on matters that the particular trustee could have influenced or controlled.[122]

56.3 As a result, treating trustees as separate PCBUs may result in charges that cannot properly recognise the full range of reasonably practicable steps available to the trustees collectively.

57. Recognising the trust or trustees collectively as the PCBU would more effectively delimit the scope of the privilege against self-incrimination:

57.1 The HSWA enables the regulator to require a PCBU (or a person who is or appears to be in charge of a workplace) to produce information and make statements, but this power does not affect a natural person's privilege against self-incrimination.[123] This reflects a legislative balancing of the public interest in investigating potential health and safety breaches against the rights of natural persons during investigations.

57.2 Interpreting "PCBU" as each trustee separately would mean that all individual trustees would have the privilege against self-incrimination, which would increase the difficulty in investigating potential health and safety breaches when trusts operate (in substance) as businesses. This difficulty is avoided if trusts or trustees collectively can be investigated as PCBUs (noting that individual trustees who are investigated as PCBUs or officers would still retain the privilege).

122 HSWA s 30 **[AAB Tab 16]** provides that a person's ability to influence and control the matter to which a risk relates is relevant to the extent to which that person is required to eliminate or minimise the risk under a duty. Section 33 **[AAB Tab 18]** provides that more than one person may have the same duty under the HSWA at the same time, and each person must discharge their duty to the extent they have the ability to influence and control or would have had that ability but for an agreement or arrangement purporting to limit or remove that ability.

123 HSWA s 168(5) **[RAB Tab X]**.

58. Whata J's view was that "[o]rthodox party or vicarious liability principles provide ample scope for prosecution of trustees who conduct business in a systemically flawed way".[124] In the accompanying footnote, His Honour noted s 161 of the HSWA "states that the actions of an employee or officer will be deemed to be the action of the PCBU." This is, with respect, incorrect:

58.1 Section 161(1) provides first, that conduct engaged in on behalf of an individual A by "an employee or agent of" that individual, acting within the scope of his, her or its actual or apparent authority, is to be treated as the individual A's conduct. If individual A is a trustee in a multiple-trustee trust, then their fellow trustees cannot be seen as their "employee". Nor can a trustee be another's agent, as the appellants note,[125] meaning no such attribution is possible.

58.2 Section 161(1)(b) allows the action of any other person at A's direction or with A's express or implied consent or agreement (or those of A's employee or agent) to be A's action. Again, a fellow trustee's failures may be difficult to qualify as occurring at trustee A's direction or with their express or implied consent (as noted above, the more likely scenario is that trustee A improperly delegated their duty to the fellow trustee, but this does not seem to fit easily within the language of s 161(1)(b)). In other words, systemic liability would be more difficult to establish using these provisions.

58.3 WorkSafe is conscious that if trustees are treated as separate PCBUs, they would still have the duty under s 34 of the HSWA, so far as is reasonably practicable, to consult, co-operate with and co-ordinate activities with each other (on the basis that each trustee would be a PCBU which has a duty in relation to the same matter). However, this is a separate kind of duty with a different maximum penalty. In addition, establishing a failure to comply with s 34 would not

124 Court of Appeal Decision at [74] **[Casebook at 38]**.

125 Appellants' submissions at paragraph 6.7; see also *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592 at 596 – 597, holding that one trustee could not act as an agent for the other trustees **[RAB Tab X]**.

necessarily establish the reasonably practicable steps available to the trustees collectively.

Access to trust assets without breaching s 29

59. The three Judges of the Court of Appeal each agreed that trust assets should pay the fine imposed against the trust business,[126] as do the appellants.[127] WorkSafe submits that the only way that a fine can be imposed against the trust assets without breaching s 29 of the HSWA is to interpret HSWA to allow for prosecution of the trust or trustees collectively. This is because:

59.1 Section 29(2)(b) – (d) of the HSWA prohibit one person from indemnifying or being indemnified by "another person". While s 29 is headed "insurance against fines unlawful" and s 29(1) and 29(2)(a) deal with policies or contracts of insurance, the language of ss 29(2)(b) – (d) is broader and encompasses indemnity outside the insurance context.[128]

59.2 The rationale for this prohibition is not expressly stated in the HSWA or its legislative history. However, it appears to be that a fine should "hurt" the defendant so that there is a deterrent effect; the rationale operates equally to prohibit any form of indemnity (other than insurance) whereby someone else other than the defendant bears the fine.[129]

59.3 A point of difference between the Judges is that whereas the Majority consider s 29(2)(b) – (d) to prevent trustee indemnification if a trustee is the PCBU, Whata J holds the opposite view; this is because His Honour says "s 29 prohibits indemnification of the fine "by another person" and "a trustee is not being indemnified by a person,

126 Court of Appeal Decision at [48] - [49] (Majority) and at [72] – [73] (Whata J) **[Casebook at 29 and 37]**.

127 Appellants' submissions at paragraph 8.10.

128 All three Court of Appeal Judges agree that s 29(2)(b) – (d) go beyond insurance policies or contract: [47] (Majority) and [72] (Whata J) **[Casebook at 29 and 37]**. The appellants also appear to consider this interpretation correct: see appellants' submissions at 8.16.

129 Te Aka Matua O Te Ture: Law Commission, Report 133, *Pecuniary Penalties: Guidance for Legislative Design* at paragraphs 15.29 - 15.34 and Guideline G16.

because the trust is not a person."[130] The appellants agree with Whata J's reasoning.[131]

59.4 It is submitted that Whata J's reasoning is internally inconsistent: if, as His Honour says, the trust is not a person, the trust is also not the owner of the assets from which the trustee would be indemnified. The owners are the trustees. As each trustee is a separate person, any attempt at indemnifying a trustee who is prosecuted out of assets owned by the other trustees as well would, as the majority notes, fall foul of the prohibition in s 29(2)(b) – (d).

59.5 By contrast, if the trust or trustees collectively were the "person" which holds the trust assets (as per the Majority),[132] then the trust assets can be used to pay the fine when the trust or trustees collectively are prosecuted because the assets cannot be said to belong to any "other person." Accordingly, trust assets can only be targeted without breaching s 29(2)(b) – (d) if the trust or trustees collectively are the "person" holding the trust assets.

Practical problems as to service, plea, and enforcement are surmountable

60. The appellants argue that a fine cannot be enforced if imposed against a trust as "trustees are only permitted [to ensure a fine against the trust is paid from trust assets] via their right of indemnity", which "only applies to liabilities incurred by the trustees personally."[133]

61. It is when trustees are accessing trust assets for a personal expense or liability when acting as trustee that trustees' need to invoke the right of indemnity.[134] If, however, the trust, or trustees collectively, were recognised as a person under the HSWA, then a direction to pay a fine out of trust assets would necessarily require the trust or trustees to comply.

130 Court of Appeal Decision at [72] **[AAB Tab 80 at 1275 – 1276, 1329]**.
131 Appellants' submissions at paragraph 7.18.
132 Court of Appeal Decision at [48] **[Casebook at 29]**.
133 Appellants' submissions at paragraph 10.1(d).
134 See Trusts Act 2019 s 81 **[AAB Tab 35]**.

62. If there is a failure to pay the fine, trustees would be jointly and severally liable to the Crown as creditor in enforcement action to recover the fine.[135] Contrary to the appellants' submission, this is not a "contortion"[136] of reasoning: it is consistent with the common law position on how a creditor (in the case of an unpaid fine, the Crown) may recover a debt against trustees.[137]

63. WorkSafe notes the possibility of potential unfairness if a fine exceeds a trust's ability to pay, making it necessary for trustees to reach into their personal assets to meet the trust's obligations. However, this is not an insurmountable difficulty. As noted above, it is common practice to adjust a fine downward for financial capacity in light of a PCBU's financial circumstances.[138] A court can, when imposing a fine, seek to adjust it according to trust assets so that the fine can be met out of the trust assets and trustees are not needing to reach to their personal assets to meet the trust's obligations.

64. A further option for enforcing a fine would be for an interested person (likely the prosecutor) to apply to place the trust in receivership under s 138 of the Trusts Act 2019.

65. The appellants point to several "practical problems" with holding the trust or trustees collectively to be the defendant, such as service, who would get to decide what the plea is, if the decision must be unanimous, whose criminal record the conviction would go on, and so on.[139] These are, again, not insurmountable:[140]

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135 Court of Appeal Decision at [51] **[Casebook at 30]**.

136 Appellants' submissions at paragraph 7.18.

137 *Selkirk v McIntyre* [2013] NZHC 575 at [16] **[AAB Tab 53 at 674]**.

138 See paragraph 51.2 above.

139 Appellants' submissions at paragraph 4.10.

140 The Majority stated in response to similar submissions that "As this Court held in *Cometa*, legislation should be interpreted purposively to allow the machinery of the Act to function as intended. As the Court said, 'difficulties in relation to matters such as service and enforcement can be addressed by means of the pseudo-corporate structure that an organisation meeting the definition of 'body of persons' will have'" (at [51]) **[Casebook at 30]**. The English Court of Appeal in *R v L* similarly stated that "potential procedural complications" should not preclude a conclusion that criminal liability of an unincorporated association was intended: at [24], [25] and [27] **[AAB Tab 51 at 656 - 657]**.

65.1 The charging document would describe the defendant as "the X trust" or "the trustees of X trust collectively".

65.2 Service can be against any one of the trustees on behalf of the trust, or through agreement, via their legal representative.

65.3 Trustees will decide on the plea to be entered for the defendant using the usual decision-making processes. A decision as to plea is no different from any other decision by trustees where there may be different opinions. Once the decision on plea is made, the trustees are duty bound to act unanimously (that is, enter that plea on behalf of the trust or trustees collectively).[141]

65.4 The conviction would be entered against the defendant as named in the charging document (it would not go in the trustees' own criminal records). *WorkSafe New Zealand v NP & MA Coogan Partnership*[142] illustrates the approach that WorkSafe proposes. In this case, the District Court convicted a partnership (which is not a discrete legal entity) and directed that the conviction must only be entered against the partnership and not against the partners individually. In making this order, the Court recognised that the way computer records are set up created some administrative difficulty in entering a conviction against a partnership; however, this did not alter the Court's approach.

65.5 Finally, it appears that trusts have been sentenced several times under the RMA.[143] While the practical details such as how plea was decided and what name the conviction was entered or how the fine was paid are not known, there does not appear to be any fatal complexity to fining a trust.

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141 Similar arguments about plea decisions were raised and rejected in *Cometa* (CA) at [58] and [61] **[AAB Tab 74 at 1091 - 1092]**.

142 *WorkSafe New Zealand v NP & MA Coogan Partnership* [2024 NZDC 32003 at [34] **[RAB Tab X at X]**.

143 See footnote 23 above.

There is a basis to charge the trust or trustees collectively in this case

66. As the appeal is on a question of law of generic application, it is not strictly necessary to address whether there is a basis for WorkSafe to charge the trust (RHJY) on the facts of this case. That is a question for the trial court.

67. In any event, WorkSafe submits that the Majority is correct that "there appears to be a basis for the Crown to allege that the relevant decision-making was made collectively by the trustees, and not by individuals".[144]

68. The business in question was the farming operations at the farm.[145] RHJY's trustees were the legal owners of the farm but in accordance with the terms of the RHJY trust.[146] The Trust Deed provides that "[the] Trustees may expend invest and conduct business or trade in any manner which would be available to a natural person."

69. Key business activities were undertaken on behalf of the trust (and third parties considered that is who they dealt with). A consultant engaged on business matters described his engagement as being with the trust.[147] On 24 April 2019, Mrs Brown signed an agreement with a contract milker as "Farm Owner" on behalf of the trustees of the trust.[148] The contract milker confirmed that his contract was with the trust.[149] A "Change of Sharemilking Arrangement" dated 21 June 2019 and signed by Mrs Brown identifies the "Shareholder/Supplier Entity" as "RH & JY Trust".[150] The "Governance health and safety inspection checklist"[151] and "Risk register"[152] note the name of the farm and worksite respectively as "RH & JY Trust". The trust account records a list of plant, equipment and stock for the farm, including the backing gate involved in the accident.[153]

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144 Court of Appeal Decision at [30] **[Casebook at 23]**.
145 80065 (Formal Written Statement of Paul Douglas Patterson) at 5.4 **[Casebook at 187]**.
146 At 5.4 – 5.6 **[Casebook at 187]**.
147 80001 (Formal Statement of Craig Purcell) at pp 1 – 2 **[Casebook at 193 - 194]**.
148 40301 (FarmWise Contract) at p 7 **[Casebook at 115]**.
149 33531 (Formal Statement of Nicholas Ian MacDonald at paragraph 5 **[Casebook at 199]**.
150 42303 (Change of Sharemilking Arrangement) **[Casebook at 163]**.
151 42405 (Governance health and safety inspection checklist) **[Casebook at 164]**.
152 42407 (Risk Register) **[Casebook at 166]**.
153 40501 (Plant and equipment schedule) **[Casebook at 167]**.

70. The trustees, while having differing levels of involvement, were nonetheless involved in the farm business.[154] Mrs Brown arranged for maintenance work on the backing gate prior to the accident[155] and the invoices from the engineer were forwarded to the trust's accountant for payment. PTL was actively involved in the management of the farm shortly before the incident.[156]

71. The fact that the farming operations were conducted in the RHJY trust's name makes it consonant with reality to hold that the trust was the "person" conducting the business. The actions of Ms Brown and PTL are more properly seen as that of officers of the trust. The alternative charges describing Ms Brown and Perpetual Guardian as PCBUs were filed in case the Court finds that a trust cannot be a PCBU.

CONCLUSION

72. For the above reasons, the appeal should be dismissed.

DATED 23 July 2026

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Counsel for WorkSafe New Zealand

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

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154 It is noted that, while trustees may have differing levels of involvement in trust business, there is nothing unusual about partners, directors or other members of a collective body likewise having differing levels of involvement in its relevant activities yet sharing liability. It is also noted that "passive" trustees ordinarily have not escaped liability by suggesting that other trustees were more "active", subject to limited exceptions: *Selkirk v McIntyre* at [40] – [45] **[AAB Tab 53 at 680 - 682]**.

155 40502 (Tax invoices from C Hayes Engineering to Mrs Brown) **[Casebook at 168]**.

156 40802 (Email from Perpetual Guardian to RHJY's consultant on 18 August 2020) **[Casebook at 175]**.