



# macmillan cowan & co

## chartered accountants

### Trustee Company Directors

There has recently been some very important case law concerning the personal liability of directors of trustee companies.

Previously, directors of trustee companies were only held to be personally liable for debts incurred by a trustee (whilst acting in that capacity) in certain circumstances (eg. insolvent trading, fraud, debts owed to Taxation Office). Under Section 197 (previously section 233) of the Corporations Act, the Full Supreme Court of South Australia, in the case "Kerry Stirling Hanel & Anor .v. John O'Neill (December, 2003)," has interpreted the law to mean that directors of corporate trustees should be personally liable to pay debts of the trustee in circumstances where the trustee is unable to pay those debts (the judges decided by way of a two/one majority).

In a more recent case, a single judge in a N.S.W. case has determined to follow the decision in the earlier case.

These decisions are likely to have significant ramifications for many directors. Previously, we had all assumed that this type of structure was a valid means of asset protection, i.e. directors had the protection of limited liability.

It should also be considered that this personal liability applies regardless of whether the company acts as trustee of a family discretionary trust or a unit trust.

It should be noted that these cases do not affect the personal liability status of directors of operating companies.

We recommend that if you currently utilize a trustee company, you should review the directorship from an "asset protection" viewpoint.

Please contact us if you wish to further discuss this matter as there may be some planning opportunities available.

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