



VPro Lawyers Newsletter
2004



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PERSONAL LIABILITY FOR DIRECTORS OF CORPORATE TRUSTEES

The effect of a recent decision of the South Australian Full Court is to make directors of trustee companies personally liable for all the debts of the trust.

Unless this decision is overturned on appeal (or the legislation is amended) the consequence for directors is twofold. First, a new avenue of personal liability has opened up. Second, directors will be the effective guarantors of trust obligations, even if there was no such intention in the first place.

The decision involved an interpretation of the Corporations Act which imposes liability on directors of corporate trustees in circumstances where the trustee company is not entitled to be fully indemnified against the liability out of the trust assets. A two to one majority of the Court in *Hanel v O Neill* held that if there was no, or insufficient, underlying assets in the trust then there was no 'entitlement' of trustee company indemnity. As a result, the director concerned was held personally liable for the unpaid debt even though the company had not lost its technical legal right of indemnity.

This is a far higher level of personal liability than that to which directors of other companies are exposed. Normally, directors are only personally liable where they allow their company to trade whilst it is insolvent.

This decision dramatically detracts from the value of trust company structures. Until the legal position is clarified, no director of a trustee company can safely allow the trustee to incur any liability (even if solvent at the time) if there is the slightest risk that the trustee may not be in a position to meet the liability. An obvious example is the circumstance of lease liability.

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