Trust eSpeaking

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Welcome to the Autumn 2026 edition of *Trust eSpeaking*. We hope you find these articles thought-provoking, interesting and useful.

To find out more about any of the topics covered in *Trust eSpeaking*, or about trusts and/or wills in general, please don't hesitate to contact us. Our details are on the top right.

Taxing the business income of charities

Inland Revenue proposal unlikely to proceed

In February 2025, Inland Revenue issued a paper entitled 'Taxation and the not-for-profit sector' known as the 'Issues Paper.'

Among other things, the Issues Paper proposed taxing the business income of charities, where that income did not relate to their charitable purposes. This was highly controversial and resulted in a flurry of submissions.

We look at charities that operate businesses and the reasons why Inland Revenue's proposal has not gained traction.

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When someone acts as a trustee of a family trust, they often take on liabilities associated with the trust. Those liabilities generally include obligations to the trust's lender (such as a bank) or other creditors.

While that does not usually cause issues for the trustee, there can be cases where a trustee is left personally responsible for a trust debt that they are not then able to recover from the trust. It's a daunting prospect for both professional and non-professional trustees.

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Even though some prenups contain clauses that say couples must review the agreement every five years, or when a significant event happens (such as the birth of a child), they are almost never reviewed.

The recent case of *Rimmer* has shown how important it is to regularly review your prenup.

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Charities in New Zealand

Section 5 of the Charities Act 2005 defines 'charitable purpose' as including 'every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.'

From time to time, public debate arises over organisations that have been granted charitable status, particularly where that status is seen as controversial. For example, Greenpeace has gained and lost charitable status a number of times, and Family First has had charitable status declined by the Supreme Court. After serious allegations of abuse and law-breaking, Gloriavale's charitable status is under review.

One charity in New Zealand has been controversial for some years. Sanitarium, the company that makes Weet-Bix and other breakfast cereals, is owned by the Seventh-day Adventist Church.

As a general rule, where a charity owns a business, and receives business profits, tax does not need to be paid on those profits, because they are being distributed to a charity which can only use them for charitable purposes. This tax exemption was closely scrutinised by Inland Revenue in the Issues Paper.

Taxing business income

The Issues Paper suggested that businesses owned or operated by charities have certain competitive advantages over non-charitable businesses. These businesses:

+ Can accumulate funds without paying tax, and therefore invest in and grow their businesses faster, and
+ May not face the same compliance costs as tax-paying businesses.

This led to Inland Revenue's proposal to tax charities' business profits where they were not related to the charitable activities in question.

The charitable sector argued that it would be very difficult to identify what business activities were related to furthering a charitable purpose and what activities were unconnected.

The Salvation Army's thrift stores might remain untaxed, but what about Sanitarium's production of healthy breakfast cereals? Sanitarium might argue that it provides free healthy breakfasts in more than 1,400 schools as part of the overall charitable endeavours of the Seventh-day Adventist Church. (It might also make the point that John Kellogg invented cornflakes in the late 1800s because he believed that eating bland breakfast cereals facilitated godly morality.)

More specific counterarguments were also made in submissions. Charities said that they faced a number of competitive 'disadvantages' which for-profit businesses did not face; these include a limited ability to raise finance and differences in their ability to claim imputation credits. Any advantages their businesses might enjoy were offset by disadvantages.

Submissions also said that where business profits were taxed and then distributed to the charity which owned the business, they would always have to be used for charitable purposes, and a tax credit would need to be given to the charity in due course. It was argued that it would be time-consuming and costly (for both the charities and Inland Revenue) to make a tax payment and later receive a credit in respect of the same funds.

A number of charities also said that they face much greater compliance costs than small businesses. They have, for example, much more stringent audit requirements; if the law changed, there might need to be an income threshold whereby small charities are exempted from having to distinguish between types of income earned.

Sue Barker, a well-known tax and charities lawyer, said that the Issues Paper did not start by asking the fundamental question of whether there is a problem in the charitable sector regarding the payment of business income tax? If charities are misusing funds and not using them for charitable purposes, this would justify more scrutiny over charitable activities and perhaps better enforcement of existing laws, but it would not justify a law change.

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How trustees contract

It is a common misconception that when signing documents in your capacity as a trustee, your risk is limited to the assets of the trust. Unfortunately, this is not the case. A contract that is enforceable against a trustee can be enforced against the trustees (or any one of them) personally.

The reason is that a trust is not a separate legal entity or 'person' in the same way as a company or incorporated society. The trust itself cannot enter into a contract or be registered on a property title; only the individual trustees' names can be listed.

It is important, therefore, for trustees to seek advice on the form of any contract that they are entering into in their capacity as a trustee. In some situations, however, clauses can be negotiated that limit the obligations of non-beneficiary trustees to the assets of the trust at the time in question (whatever those may be). This is an important protection for non-beneficiary trustees.

These clauses will not usually be extended to include trustees who are also beneficiaries.

It is also important for the trustee to have a clear understanding of the trust's assets and whether the trust is in a position to meet its obligations under the terms of the contract being entered into by the trustees. Taking on a loan that the trust would be unable to service, for example, would not be a wise decision for a trustee to make.

How can trustees recover their losses?

Often, however, the fact that individual trustees are liable to the trust's creditors does not cause individual trustees significant issues. Trustees have a general right of indemnity from the trust funds; if they must pay a debt on behalf of the trust, the trust's funds must be used to reimburse the trustee.

What happens if the trust has no assets

In a recent decision of the High Court of Australia,[1] a former trustee found himself in the unenviable position of being found liable to a creditor of the trust for payment of more than A$3 million that he was unable to then recover from the trust.

A creditor of the trust had begun court proceedings against the former trustee in 2006 relating to unpaid sums on a share purchase.

In February 2007, the former trustee resigned as a trustee of the trust and was replaced by a trustee company, whose director was the brother of the Default Beneficary and Appointor of the trust.

Nine years later (and after a series of court proceedings in the meantime between the creditor and the trustees and others), the court entered judgment against the former trustee in favour of the creditor for A$3.4 million.

In the ordinary course, the former trustee would have then demanded that sum from the trust by way of indemnity. However, the trust did not have sufficient assets to provide indemnity. The court found that the current trustees had deliberately depleted the trust's assets to avoid any potential liability to either the creditor or the former trustee.

The current trustees of the (perhaps aptly named) Sly Fox Family Trust were found to have dishonestly and fraudulently stripped assets out of the trust by transferring its assets to various family members and companies controlled by family members of the Default Beneficiary and Appointor.

In the court proceedings that followed, it was unsuccessfully argued that the current trustees owed an obligation to the former trustee to ensure that the trust retained sufficient assets to meet any financial obligations that it might owe to the former trustee under the right of indemnity. The court, however, did not agree that the current trustees owed such an obligation to the former trustee.

Two appeals followed; the decisions of both the Court of Appeal of the Supreme Court of New South Wales and the High Court (which is effectively the Australian equivalent of our Supreme Court) were split. In the Court of Appeal the judges were split 2/1,

and they were split 3/2 in the High Court. This had significant repercussions for both the creditor of the trust and the former trustee, neither of whom were successful.

1 *Naaman v Jaken Properties Australia Pty Limited* [2025] HCA 1.

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Death, property and prenups

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Early relationship prenups

What usually happens is that at the start of their relationship, a couple decide to buy a house together. They want to protect their respective deposits. They may have children from prior relationships to whom they want to leave their 'share.' They buy a house as tenants in common and sign new wills. They also sign a prenup stating:

+ Their shares in the house are their respective separate property
+ They may give each other a right to occupy their share of the home for, say, two years after their death, and
+ They intend leaving their separate property to their respective children.

What typically happens next is that the prenup and the wills are put into the bottom drawer and forgotten about. The couple may get married (which automatically revokes their wills), and/or they sell their first house and buy a new property that better suits their needs.

They often buy the new house as joint tenants as, after a lengthy relationship, they want to ensure their spouse inherits the home and cannot get kicked out by their late spouse's children. When they die, their property lawyer would give them the standard advice that property that is owned jointly passes automatically by survivorship and does not form part of your estate.

Dying

When one spouse dies, leaving a mix of property in their personal and joint names, what happened next used to look like this:

1. Transmitting all jointly owned property (the house, the joint bank account, etc) into the sole name of the survivor
2. Identifying any property in the deceased's sole name, and
3. If the deceased had a will, distributing in accordance with that, or

   If the deceased died without a will (intestate), distributing in accordance with the Administration Act.[2]

What happens now?

This long-standing estate administration process has recently been upended by the *Rimmer* decision in the Court of Appeal.[3] This decision made two statements that have changed the way lawyers think about prenups:

1. It is the prenup (not the will, property law or the intestacy rules) that governs what part of the relationship property forms part of the deceased spouse or partner's estate,[4] and
2. A prenup will always be given effect to (unless successfully challenged) on the death of spouse or partner.[5]

This has now changed the process to:

1. Finding out whether there is a prenup, and, if there is
2. Dealing with all the property specified in the prenup as set out in the prenup
3. If there is property NOT covered by the prenup, the survivor can either:
   – Apply for division of the relationship property that is not covered, or
   – Receive their gifts under the will if there is one, or under the intestacy rules if there is not.

How is this different?

The rules of property law ordinarily decide what falls into an estate following someone's death. That is, if they own an asset in their sole name (such as an identifiable share in a home, or a bank account in their sole name), that will form part of their estate. However, if they own property jointly with someone else, that will pass automatically to the surviving owner(s).

In saying that 'the division instead proceeds in accordance with the s 21 agreement,' *Rimmer* appears to be suggesting that property owned solely in the name of the deceased could nevertheless be transferred to the survivor if it is defined in the prenup as relationship property (particularly if the prenup specifies how relationship property is to be divided in the event of death).

2 Section 77 of the Administration Act 1969.
3 *Rimmer v Wilton* [2025] NZCA 374.
4 Para [40].
5 Para [39].

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Taxing the business income of charities

Government response

Recently, Revenue Minister, Simon Watts confirmed that Inland Revenue is unlikely to pursue the proposal to tax charities' business income. He suggested that there might be more scrutiny over the way charities use funds to ensure that existing laws are being followed, and there may be changes yet to come regarding 'donor controlled' charities, including rules about minimum distributions which must be made each year.

Charities seem to agree that better enforcement of existing laws is preferable to more law changes. The not-for-profit sector has already responded to considerable change in recent years; charitable trusts were impacted by the Trusts Act 2019, and incorporated societies have been significantly affected by substantial law changes under the Incorporated Societies Act 2022.

The most common criticism of New Zealand law relating to charities seems to be that 'advancement of religion' qualifies as a charitable purpose, even where the religion (or a popular figure associated with it) has a questionable reputation. There are, however, no current proposals to review that aspect of the law. +

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What can trustees do?

Trusteeships come with risks. When taking on obligations to third parties, trustees must carefully consider the financial position of the trust, and any risks associated with the people involved.

They should also consider the terms of the contracts they are entering into and whether any clauses can/should be included to limit their liability as non-beneficiary trustees.

Indemnities are only as valuable as the assets of the trust at the time. Therefore, trustees should not rely on indemnities alone if there are other options available to limit their risk. +

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That is a huge departure from the current rules, which state that, when someone dies, their executors (if they have a will) or administrators (if they die without a will) have a strict duty to distribute their property either in terms of the will or the intestacy rules.

If their spouse or partner disagrees with those rules, they can elect to file an application in the Family Court; whatever the court then decides takes precedence over the will or intestacy rules. *Rimmer* seems to suggest that the executors/administrators can circumvent the rules!

What next?

Now as a result of *Rimmer*, the first thing we as lawyers need to do is find out if there is a prenup – even if it is 30 years old!

Instead of just working out what passed by survivorship (with everything else going to the estate), we now must establish how a potentially outdated prenup applies to the property owned by the deceased many years later.

The Court of Appeal decision in *Rimmer*, may not be the last word, as the Supreme Court has granted leave to appeal, so it may be that the rules change again.

For now, however, make sure if you have a prenup, that both your prenup and your will agree on what should happen to your property when you die.

If you think you have a prenup and you haven't reviewed it in more than five years, now is the time to do so! +

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