



**CORNEY
& LIND**
LAWYERS

BRISBANE • GOLD COAST

BRISBANE

PO BOX 236,
RBH POST OFFICE 4029
PHONE: (07) 3252 0011
FAX: (07) 3257 7890
Suite 43, Level 4,
Royal Brisbane Place
17 Bowen Bridge Rd, HERSTON

GOLD COAST

PO BOX 825, OXFENFORD 4210
PHONE: (07) 5561 7070
FAX: (07) 5529 8111
2A Wimbledon Way, OXFENFORD

email: admin@corneyandlind.com.au
web: www.corneyandlind.com.au
ABN 19 986 469 033



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Discretionary / Family Trust Assets exposed

A recent Federal Court decision has opened the door to these, once regarded as "safe as houses" structures, potentially crumbling under the weight of claims from unsatisfied unsecured creditors.

The decision is that of Justice French on 29 June 2006 in - **Australian Securities & Investments Commission, RE Richstar Enterprises Pty Ltd (ACN 099 071 968 v Carey** WAD 83 of 2006.

This decision was essentially answering the question of ***whether property of a person could arguably include property held by a third party as trustee for any trust in which the person was a beneficiary?***

Short answer: Yes, where the person controls the trust

The following statement is particularly sobering for anyone serious about asset protection using discretionary / family trusts:

"... [T]he beneficiary who effectively controls the trustee's power of selection [of who to distribute to] because he is the trustee or one of them and/or has the power to appoint a new trustee has something approaching ... ownership of the trust property." (p9)

What the court found was that, where the trust is really a vehicle at the will of or under the effective control of a controlling person (either personally or through a corporate entity they control), that property is able to be treated as property of the controlling person for the purpose of a receiver appointed under section 1323 of the Corporations Act exercising control over it.

An example given by the court, gives this principle huge potential reach:

"By way of example, Mr Beck is a beneficiary of the Agribusiness Annuity Trust of which Eagle Bluff Nominees Pty Ltd is trustee. He is director and secretary of that trustee company. He is the original appointor under the

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trust and his wife, Anne Beck, the current appointor. The trustee has a wide discretion including the power to prefer one or other beneficiary to the total exclusion of another beneficiary [just like a normal discretionary trust]. Mr Beck would appear, through his trustee company, to have effective control of the assets of the trust. ... His interest would appear to amount to effective ownership of the trust property. The property of that trust is, in my opinion, amenable to control by the receivers under s 1323."

Asset Protection Lessons:

The "at risk" person, whose assets are seeking to be protected should, most conservatively, not be:

- A trustee
- An officeholder of the trustee
- A shareholder of the trustee
- An appointor of the trust

Our [Succession Of The Control Of Your Discretionary / Family Trust LawPack](#) is a great starting point in the further consideration an implementation of changes for both asset protection and estate planning / succession reasons.

Should you wish to discuss any of the above in more detail or require assistance in determining how these changes may affect you, please do not hesitate to contact us.

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Specific Advice

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