

BOOK REVIEWS

Modern Trusts and Taxation by YURI F. R. GRBICH, LL.B., LL.M. (Wellington), PH.D. (L.S.E.), Barrister of the New Zealand Supreme Court, Senior Lecturer in Law, Monash University; GREGORY D. MUNN, LL.B., B.COMM. (Melb.), LL.M. (Monash), A.C.I.S., Barrister and Solicitor of the Supreme Court of Victoria and HARRY REICHER, B.E.C., LL.B. (Monash), LL.M. (Melb.), Lecturer in Law, Monash University. (Butterworths, 1978), pp. i-xix, 1-283, 284-327. Paperback, recommended retail price \$22.80 (ISBN: 0 909 83571 3).

This book is the first in a series which bears the general title of "Commercial Law in Context" sponsored by the Law Faculty of Monash University. The concept is a most welcome development in the field of legal publishing and is an extension of the activities of the Faculty in the field of continuing legal education. The Monash Law Faculty has developed a programme of continuing legal education (CLE) which is perhaps unequalled in Australian law schools. Its breadth of scope and organisational success owes much to the vision and efforts of the incumbent of the Sir John Latham Chair of Law, Professor Robert Baxt, who is also General Editor of this new series.

The book is a collection of articles from a number of legal academics, private practitioners and an accountant on an area of intense contemporary interest, the treatment of the income of trust estates under the *Income Tax Assessment Act 1936* (Cth). It appears that many of the contributions were earlier in the form of papers presented to seminars arranged under the auspices of the Monash CLE programme, which are now being exposed to a wider public.

The stated rationale behind the "Commercial Law in Context" series of publications is to present as rapidly as possible current thinking about legal and practical issues in the world of commerce. Its appeal is not restricted to lawyers but should find a receptive audience amongst others who have a professional interest in the impact of the law and the legal system on business, such as accountants, managers, economists and policy makers. The presentational style is generally spare yet well balanced, but without excessive concentration on legal technicalities which may tend to alienate the non-legally-trained reader.

Speed of production is an essential requirement for the commercial success of a publication of this nature yet the standard of presentation gives little indication of haste. The work is carefully constructed and there are few typographical, cross referencing or indexing *faux pas*. The law of taxation in Australia is a field which is in a constant state of change. The present Treasurer's campaign against tax avoidance arrangements has led to amendments to the Assessment Act proceeding at an unprecedented pace. Each year the numbers of decisions of the Taxation Boards of Review and State and Federal courts run into the hundreds. Indeed, small parts of this book have already become redundant by reason of the passage of the *Income Tax Assessment Amendment Act 1979* (Cth) which amongst other things, reversed the

effect of the decision of the High Court of Australia in *Union Fidelity Trustee Company Ltd v. Federal Commissioner of Taxation*,¹ and attempted to prevent "trust stripping" schemes.

These are but minor points since at the time of writing the great bulk of the material in the book is still highly relevant and up-to-date. Whether this will remain so after the August 1979 Budget is a matter of conjecture. The use of trusts as a device to minimise taxation has been the subject of a concentrated political and media campaign in recent months. The sight of well-known public figures making haste to disentangle themselves from family trusts and the size of the Federal deficit portend, I suggest, a much bleaker future for the use of trusts in income tax planning.

Turning to the contents of *Modern Trusts & Taxation* we find an excellent discussion in the first two chapters of the salient features of the two most popular trust vehicles: the modern non-exhaustive discretionary trust and the unit trust. Yuri Grbich in the first chapter "The Mechanics of Discretionary Trusts" gives a comprehensive survey of the law and examples of a number of practical difficulties associated with the use of this device. He is to be commended for his refreshing honesty of approach to the topic as exemplified by his first paragraph:

"There is much to be said for re-asserting the most obvious and most important point about discretionary trusts. Discretionary trusts are a tax avoidance device. This is not to deny that they can be a useful business vehicle [or achieve objectives other than tax avoidance] . . . But the dominant objective in the mind of the vast majority of Australians who use discretionary trusts is tax avoidance . . ." (page 1).

Such an approach gives the lie to many of the hypocritical and self-serving statements which have been made about the use of the trust in modern business activities.

Further support for the Grbich truism can be found in M. J. Walsh's chapter on unit trusts where he states:

"It is probably not an overstatement to say that unit trusts have in many respects supplanted companies as the most common vehicle through which business is conducted in the non-public company area." (page 36)

This popularity has assumed boom proportions since amendments in 1973 to eliminate many of the loop-holes in the scheme for taxation of companies. Mr Walsh's practical experience with the use of the unit trust is clearly apparent in his essay, which should prove a mine of information for the tax practitioner.

In my view, the highlight of the book is the contribution made by Gregory D. Munn, one of the editors and a Melbourne solicitor. He has provided three particularly illuminating chapters "Practical Problems with Trusts", "Service Trusts and Superannuation for Professionals" and "Selected Tax Problems with Trusts". The first covers such questions

¹ 69 A.T.C. 4084.

as stamp duty implications, transfer of assets, appointment and duties of the trustee, variation and determination of the trust. The second concentrates on the consequences of the decision in *Phillips v. F.C.T.*²

Unfortunately Munn did not have at the time of writing the benefit of knowing the decision of the Federal Court of Australia on appeal³ which upheld the decision of Waddell J. of the New South Wales Supreme Court. (Though the decision is noted in a Stop Press section.) The Federal Court did put considerable weight on the fact that the rates charged by the service trust to the accounting partnership were reasonable and Munn's comments on this aspect would have been of interest.

In "Selected Tax Problems with Trusts" Munn explores the tax avoidance possibilities of transferring trust losses, terminating the trust and skirting the operation of section 98 of the Income Tax Assessment Act. His writing style was a model of clarity and conciseness and if future publications in the series emulate his standards they will assuredly prosper.

In Chapters 4 and 5 Harry Reicher does a competent job of explaining the operation of Division 6 of the Act and the effects of the 1977 amendments which slightly reduced the attractiveness of trusts for income splitting purposes. Bruce Sundberg has produced a helpful guide to the problems involved in alienations and assignments of income to trusts in the light of the decisions of the High Court in *Norman v. Federal Commissioner of Taxation*⁴ and *Shepherd v. Federal Commissioner of Taxation*⁵ and in particular the decision in *Everett v. Federal Commissioner of Taxation*.⁶

Mr D. C. Wilkins' contribution concerning the accounting and administration difficulties faced by those charged with handling these aspects of trusts left me with a slightly unfulfilled feeling. My impression was that the day-to-day practical problems were given insufficient attention, but perhaps these are few and can be resolved with reasonable ease. He also illustrates his paper with sample accounting entries and reports for the trust and for the company trustee.

I found Grbich's treatment of the operation of section 260 (the general anti-avoidance provision) on trusts the least satisfactory. The varying interpretations of the section which have evolved over recent years and the divergent approach adopted by the High Court of Australia from that of other common law jurisdiction make this a notoriously difficult area of law to analyse. Grbich's "basic bookwork" portion of the chapter is a good summary of the major strands of judicial interpretation which have emerged from the leading cases. Thereafter he indulges in a lengthy examination, filled with somewhat

² 77 A.T.C. 4169.

³ 78 A.T.C. 4361.

⁴ (1963) 109 C.L.R. 9.

⁵ (1965) 113 C.L.R. 385.

⁶ 77 A.T.C. 4478, 78 A.T.C. 4595 and currently on appeal to the Full High Court.

technical and trendy expression, of a large number of instances in which section 260 (or its equivalent in New Zealand in particular) has been invoked, which I feel tends to confuse rather than clarify the issues, especially for the busy practitioner. To his credit, however, he effectively refutes the posture which Chief Justice Barwick has taken toward the operation of section 260 upon new sources of income, exemplified by his decision in *Slutzkin v. Federal Commissioner of Taxation*.⁷

The concluding chapter, "The Phenomenon of the Two Dollar Nominee Company as Trustee: Some Practical Consequences", was written by Professor Baxt and explores some of the potentially horrendous liabilities which might be imposed on corporate trustees and their directors by the courts of equity and by the companies legislation. It is sufficient to make all but the most fearless or impecunious recoil from assuming any fiduciary duties in relation to a trading trust. Baxt does point out though, that many of the disastrous consequences are unlikely to befall many corporate trustees or their directing minds, because of the problems creditors or beneficiaries have in enforcing their rights. He reaches an interesting conclusion:

"A totally new approach is needed; but perhaps the cost is too great to superimpose a new system to cope with what may be a passing phenomenon. In such a case it might be simpler, and probably fairer, to ban the use of the corporate trustee except in the form of the recognized trustee companies" (page 283).

An appendix to the work consists of a number of useful precedents for a discretionary trust and a unit trust established by deed of settlement; a unit trust created by declaration; and for the acceptance by and transfer of a business to a trust.

Overall *Modern Trusts and Taxation* comes highly recommended as stimulating reading for a wide audience. The Monash University Law School merits good wishes and support in the production of other publications in this series.

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Understanding Lawyers; Perspectives on the Legal Profession in Australia edited by ROMAN TOMASIC. (Law Foundation of N.S.W. and George Allen and Unwin A 1978), pp. (i-xxi), 1-505. Cloth, recommended retail price \$19.95 (ISBN: 0 86861 160 3); Paperback, unpriced (ISBN: 0 86861 248 0).

"Understanding Lawyers", a recent enterprise of the Law Foundation of New South Wales and part of the "Law in Society Series" is a penetrating and refreshing insight into the state of the legal profession in Australia. It acts as a base from which avenues of reform in not

⁷ 77 A.T.C. 4076.

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