

*Fernando*⁵ the subject is most important, and therefore it is to be regretted that it has been omitted from a book treating the topic of natural justice.

Finally, two sentences in Flick highlight the main task confronting public administrators and administrative law reformers. On page 9 he writes: "The recognition of the need to improve, by means other than judicial review, the process by which a discretion is exercised is new to both English and American administrative law. There is nothing fair in an administrative process that permits an unfair administrative decision to be remedied by a fair judicial review of the decision-maker's action."

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Cases and Materials on Taxation by R. BAXT, B.A., LL.B. (Syd.), LL.M. (Harv.); Professor of Law, Monash University; R. GELSKI, B.A., LL.B. (Syd.), LL.M. (Lond.); Senior Lecturer in Law, University of New South Wales; Y. GRBICH, LL.B., LL.M. (Wellington) PH.D. (L.S.E.); Senior Lecturer in Law, Monash University; B. MARKS, LL.B. (Syd.), LL.M. (Illinois), M.C.L. (Wash.); Senior Lecturer in Law, University of Adelaide; and K. POSE, B. JURIS., LL.B. (Mon.), B.C.L. (Oxon.); Senior Lecturer in Law, University of Melbourne. (Butterworths, 1978), pp. i-xxx, 1-790. Cloth, recommended retail price (with 1979 supplement) \$33.00 (ISBN: 0 409 34300 5). Paperback, recommended retail price (with 1979 supplement) \$27.50 (ISBN: 0 409 34301 3).

This casebook is a most useful addition to the range of treatises, casebooks, services and manuals on Australian income tax law, practice and policy. It is the joint product of no fewer than five learned authors, which is remarkable in itself for a volume containing only 117 pages of original writing—a productivity record that would make a shop steward sob with envy.

According to the preface, the goal of the book is to bring more "depth and rigour" to the study of revenue law. The works already available, the authors suggest (perhaps a trifle harshly), are a "vacuum" as far as depth and rigour are concerned, which the present work is to "fill". The jacket notes declare that the casebook is intended both for the practitioner and for the student, but its value to the practitioner must be reduced by its lack of an index and by the fact that the table of cases lists judgments by the initial of the first party only: thus, *F.C.T. v. Mitchum* is mentioned only under F, not under M. At least one case which is reproduced at length, *Charles Moore & Co. v. F.C.T.*, is not shown in the table of cases as having been reproduced at all, but only as having been cited.

⁵ [1967] 2 A.C. 337.

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The materials are arranged into thirteen chapters, starting with *History and Constitution*, finishing with *International Taxation, Residence and Source* and covering in between a comprehensive range of other topics such as the concept of income, deductions, trading stock, alienation, tax avoidance and the like. In addition to decided cases, there are relevant extracts from the Asprey Report and from articles and budget speeches. These have value as general background and as indications of where tax legislation might head in the future.

Inevitably, the authors have had to be selective in the judgments they have chosen to reproduce. While one can always think of other cases which should have been included, the resulting collection gives as fair a cross-section of the case-law as could be expected in a work of this size. It could have been a little more up to date, however: *London Australia Investment Co. Ltd v. F.C.T.* was reversed in part by the High Court on 20 September 1977, but only the 1974 judgment of the Supreme Court is given. Even though the book claims to be correct only as at 1 December 1977, one might also have thought that there would have been time to insert the High Court judgment in *F.C.T. v. St Hubert's Island Pty Ltd*, which was handed down on 18th April 1978, rather than the reasons of Mahoney J., which were also in part reversed. The book appears not to have become generally available for sale, after all, until January 1979.

The commentary by the authors appears at the beginning of each chapter, with additional passages interspersed among the materials as needed. The authors' views are apparently intended to be in larger type so as to distinguish them from the extracts of cases and other materials, but this system breaks down occasionally, leaving the reader wondering whether he is looking at a judgment or the authors' observations on it (pages 337-344). The commentary is in general well organised and would be helpful for a student, particularly in relation to heavily litigated provisions such as section 26(a) and section 260. There are lapses, however, the commentary on deductions being marked by foggy reasoning, tortured syntax and haphazard punctuation:

Do you feel that items of expenditure allowed as deductions under the specific deduction sections will also be deductible under s. 51(1); eg repairs (s. 53) and bad debts (s. 62) are perhaps obvious examples. [No question-mark.]. . . It may not matter whether the deduction is allowed under s. 51(1) or under a specific provision, but note that s. 82(2) was amended in 1969; the words 'has been allowed or is allowable as a deduction' used to read 'is an allowable deduction' (page 276).

Or again,

Do not questions of taxability and deductibility involve the same (or, at least, very closely related) policies, tests, and underlying issues—though articulated from slightly differing points of view. [No question-mark.] These two questions should perhaps be distinguished from an easy premise: the basis for a deduction under s. 51(1) must be the inclusion of some related item in assessable income (*ibid.*).

Such weak patches in the commentary are fortunately rare, but it is

hard to see how they found their way into the final proofs undetected, given the concentrated attention of the five aforementioned learned authors.

In the preface and elsewhere, the authors place great emphasis on the need for students of tax law to be aware of the continuing social, economic and political debate which surrounds it: "Tax has become far too important to risk having a student learn it as a technical exercise entirely insulated from debates about distributional justice and economic efficiency . . . [This book] can and does raise the main questions" (page v). Given the importance which the authors obviously attach to this aspect of the subject, it is strange that it is precisely here that the work falls furthest short of the mark. Chapter 2, titled *Income Tax in Perspective*, begins with the declaration that "Money is not everything. To philosophers and academics, the protection of basic liberties often looms much larger". Students are inclined to take this proclamation as a sign of an exquisite sense of humour. Be that as it may, it both summarises one of the themes of the book in relation to revenue policy and epitomises the simplistic approach of the authors to it.

For the interrelation between "basic liberties" and "money" (private property) is far more complex than the authors appear to realise. On a general level, the authors overlook the indisputable, if not fully explained, fact that the only societies to enjoy what we call "basic liberties" have been those in which there has been a money-based, free-market economy.¹

On a more specific plane, some evidence that tax legislation can itself be used indirectly to curtail basic liberties emerged a few years ago when Ingmar Bergman and a number of other notable people emigrated from Sweden for tax reasons. In a country with a high cost of living and heavy taxes, everyone, it was claimed, had to cheat on his income tax in order to survive. The revenue authorities could therefore silence any critic by the mere threat of calling for a printout of his last ten years' tax returns, which would be bound to contain exaggerations or dissimulations rendering him liable to prosecution. I do not know whether these allegations were ever proven, but they are not inherently implausible.

Another leading theme in the authors' treatment of revenue policy is that taxation is an inherently good thing since it "enables the majority to despoil the wealthy minority" (quoted page 25) and redistribute the loot. The commentary scolds those who talk of the "burden" of tax, "since the degree of burden turns on what a taxpayer gets back" (page 31). Quoted with apparent approval is the proposition that "It is not a question of taking away income to which persons are entitled; there are no such entitlements to shares in the communally, cooperatively produced output of goods and services which constitutes the national income" (page 24).

But their aspirations to "depth and rigour" should have led the

¹Lindblom, *Politics and Markets: The World's Political-Economic Systems* (1977) Ch. 12.

authors to discuss at least some of the counter-arguments. For even if one leaves aside the point that the wealthiest people are precisely those who are best able to avoid tax altogether, the fact is that even if the wealthy minority were "despoiled" down to their Argyle socks, the resulting redistribution would add only a few cents to the incomes of the least affluent people, since in our society the rich are too few for their spoliation to make a measurable difference to the economic position of many others. Australia has long since achieved greater equality of income distribution than most communist countries.² The probable effect of a further substantial redistribution of incomes would be a further reduction in incentives to produce.

This can be inferred from the fact that in all high-tax countries "alternative economies" are flourishing, leaving no doubt about what the people at large think of the proposition that talking of tax "burdens" is meaningless since what matters is what the taxpayer gets back. Perhaps the most significant feature of the cash-based alternative economy of *Schwarzarbeit* is its often-observed efficiency. The effect of heavy taxation on incentives and the smooth working of the market as a system of adjustment and control is indisputable, according to those who have compared the price, quality and speed of delivery of goods and services traded in the alternative economy with those in the tax state's official economy.³ Nor is it difficult, in light of this evidence, to imagine what the average person would think of the proposition that the fruits of his own labour are "communally, cooperatively produced output" to which he himself has "no entitlement".

The authors do raise in passing the possible effect of progressive taxation on incentives, but neither the materials nor the commentary takes this vital question any further.⁴ The resulting flavour, reminiscent of the London School of Economics in the days of Harold Laski, suggests that the authors have missed the contemporary intellectual tide. Current socio-economic thinking on these matters is better summed up by the present Director of the London School of Economics, Professor Ralf Dahrendorf: "Redistribution without growth", he declares, "invariably means general impoverishment".⁵

The authors' belief in the desirability and inevitability of heavier taxation seems to stem in part from outdated assumptions about the

² *Id.* 269-272. New Zealand and Denmark are in a similar position, with the United Kingdom and Sweden not far behind. The United States is placed further down the list (*i.e.* income distribution there is less equal) but ahead of the Soviet Union.

³ This observation is disputed by *The Economist* on the ground that since "black" business cannot advertise, there will be less competition and therefore greater inefficiency: *The Economist*, 30 June-6 July 1979, 73-74. *The Economist* has made a number of interesting contributions to the debate on tax policy, including the contention that the United Kingdom Government could gather the same amount of revenue as now if all income-earners were taxed at a flat rate of 15 per cent.

⁴ See Bostock, "Progressive Income Tax—Can We Afford It?" (1977) 6 *Australian Tax Review* 3.

⁵ Dahrendorf, *The New Liberty* (1975) 13.

economies of scale and the perceived resulting need for ever-larger and more suffocating bureaucracies:

Australian society is becoming increasingly capital-intensive and the planning needs of large scale technology further increase the need for co-ordination. . . . Computers make centralized information storage and processing more effective. The inevitability of a planned economy is already superseding the outdated rhetoric of anti-big-government versus anti-big-business arguments. . . . The question is no longer *whether* centralized bureaucracies will control society. The momentum towards this is already irresistible (page 30).

This despairing outlook reflects habits of thought which may result from the fact that the conventional Marxist analysis of industrial society was conceived in the 1850s at a time when the economies of scale were still increasing. The question of scale economies has many ramifications but, generally speaking, in most industries the trend has been in the direction of smaller scale for several decades now, ever since the technology of electricity transmission made it possible for heavy industry, particularly the basic metallurgical industries, to be moved nearer to large markets instead of being concentrated in the coalfields. This process has been greatly accelerated by road transport, the replacement of metals by plastics (which can be fabricated almost on a village-industry scale) and above all by the computer. So far from making centralisation inevitable, computer technology has placed small-scale industry on the threshold of a vast improvement in efficiency and versatility. The ten-dollar microprocessor enables small businesses to carry out administrative tasks that would have required armies of clerks in earlier times; re-programmable numerical control of machine-tools permits the production of ranges of products which once would have needed separate and costly production lines. In any case, attitudes among today's workforce present large-scale operations with insuperable problems of management and industrial relations. Large organisations such as General Motors and BHP are able to work efficiently only by decentralising as much decision-making as possible to each productive unit—by pretending, in effect, that they are not such large-scale organisations at all. This book, incidentally, could well be one of the last for some time which subscribes to Daniel Bell's shimmering vision of the "post-industrial society". There is increasing reason to believe that this brave new world was an illusion founded on a too-sanguine reading of some ambiguous statistics. If it ever did exist, it was killed by the OPEC *shokku* of 1973, as the distinguished Professor Bell himself would probably now agree. The society of the knowledge-worker is not for now. For today, and tomorrow, we are still in the land of the miner, the farmer, the production engineer and the sales representative.

Finally, no discussion of current issues in revenue policy can be taken seriously which omits all reference to the socio-political phenomenon which has come to be known as the "tax revolt". This movement did not begin with Proposition 13 on June 6 1978, or with the even more striking Proposition 4, which aims to limit the size of government

by confining its revenue per head to the current level.⁶ It burst into world-wide prominence with the success of the Progress Party in the Danish elections of December 1973. This party, under the leadership of a former lecturer in tax law at the University of Copenhagen, Mr Mogens Glistrup, attracted the second-largest number of votes with a platform consisting solely of a pledge to abolish income tax. The elections of February 1977 gave the party further seats in the *Folketing*. In Australia, the tax burden was an issue in the federal elections of 1975 and 1977, and since 1976 there has been a kind of race among the States to abolish death duties. Such a conjunction of signs could not be ignored.

Nevertheless, this is still the best generally available tax casebook for students, and assembling it has been a worthwhile enterprise. Since it will no doubt run into further editions, the authors will have the opportunity to bring the work nearer to the exacting standards which they have set for themselves in the preface.

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A Constitutional History of Australia by W. G. McMINN, Associate Professor of History, University of Newcastle. (Oxford University Press, 1979), pp. i-xiii, 1-213. Cloth, recommended retail price \$18.50 (ISBN: 0 19 550562 x).

Historians tend to be "timorous souls" rather than "bold spirits". By focussing on narrow subjects or periods they can produce conclusions which are, if not incontrovertible, at least unexceptionable. Few have the confidence to paint a broad canvas, to analyse societies of people and institutions in general terms. Such confidence is born of a vision and understanding which eludes most observers.

Yet there is another side to the historian's trade which bridges the gap between the general and the particular. It is the sort of history taught in schools, and presented as context material in other disciplines, like law. It is the history of broad themes based on secondary sources rather than primary materials—essentially, history by synthesis. The defect of such history is that the facts are untested and the interpretations adopted are usually the orthodox ones. The merit lies in the spread of knowledge to non-professionals, in the enlightenment, albeit imperfect, of other areas of scholarship.

A Constitutional History of Australia by W. G. McMinn falls into

⁶ Proposition 4 was passed in November 1979 by 74% in favour to 26% against, surpassing the 64-35% vote by which Californians adopted Proposition 13. The effects of the first 18 months of Proposition 13's operation are discussed in *The Economist*, 5-11 January 1980, 18-23. The article concludes that the effects have been beneficial for California's economy, but that there are a few problem areas. It then examines whether these problems are likely to be short-term or not and inclines to the view that they will be overcome.

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