

Discretionary Trusts, by I. J. Hardingham and R. Baxt, (Butterworths Pty Ltd, Australia, 1975), pp. i-xxvii, 1-235. Price \$15.00.

One of the most unusual phenomena in commercial life in the past 10 years has been the growth in the use of discretionary trusts, especially in Australia, although experience elsewhere in the United Kingdom and the United States, where their use has been somewhat extraordinary, suggests that perhaps there will be many more developments in the future in Australia.

Trusts and settlements for more than 100 years have been high on the list of arrangements to retain and redistribute wealth within families. Whilst at times they have formed the basis of commercial undertakings, since the turn of the century settlements tended to diminish in popularity particularly because of the convenience which was offered by the limited liability company and ease of incorporation. But, with greater restrictions being imposed on the use and conduct of limited liability companies as well as ever-increasing revenue burdens, it was not surprising to see planners and their advisers returning to the use of trusts, especially discretionary trusts, as a means by which some of the restrictions could be eliminated or modified. At the same time, trusts have tended to give rise to considerable fiscal advantages if used in the most appropriate way.

Two major developments assisted in the return to popularity of trusts, especially discretionary trusts. The passing of the Perpetuities and Accumulations Act or its equivalent in Victoria, Western Australia, Queensland, U.K. and New Zealand has enabled many of the inconveniences of the old rules of remoteness of vesting and accumulations to be avoided or eliminated. Trusts became more flexible as the period of their existence could be measured with certainty otherwise than by reference to a life in being or another's death.

The second factor was the decision of *McPhail v. Doulton*¹ in which the House of Lords determined that a discretionary trust could not be invalid by reason of the trustees being unable to draw a list of all the eligible beneficiaries at any given time. Rather it was sufficient if it were possible for the trustees to be able to determine at any time if any particular person was or was not eligible to receive a share of the trust property.

The decision in *McPhail v. Doulton* has led to a greater freedom in the description of beneficiaries in deeds of settlements and more particularly those containing discretionary trusts. However, until now the practitioner has lacked a definitive work to which he would resort for assistance in drawing and interpreting discretionary trust deeds. This void has been filled by Dr I. J. Hardingham and Professor R. Baxt with their book *Discretionary Trusts*. This book is the result of the authors rewriting and adding to an original thesis of the firstnamed author.

As may be expected, the important decision of *McPhail v. Doulton* occupies the authors in the early chapters. That decision and the earlier decision of the House of Lords in *Re Gulbenkian*² is discussed and examined in depth. Additionally, the authors consider the earlier development by the courts of the principles of certainty of objects. This examination makes it evident that equity's creature or child, the trust, has not in the 20th century completed its development but it is developing not only in logical manner but it also accommodating to the changing requirements of a modern society.

The clear enunciation of the principles emanating from the judgment in *McPhail v. Doulton*, especially in chapter 3 and the discussion on the question of permitting a mere power to arise out of an invalid trust power, is illustrative of the depth of research undertaken in the production of this work.

The authors have made a detailed analysis of the nature of the various rights of discretionary objects and the duty of trustees with respect to such objects. Their examination of the problems inherent in the general invalidity arising by reason of the object of the trust not being described with precision so as to be invalid by

¹ [1971] A.C. 424.

² [1970] A.C. 508.

reason of uncertainty proceeds clearly and logically. It attempts to reconcile the differences produced by a variety of cases both in the United Kingdom and Australia. What will prove particularly useful to the specialist is the discussion of the limitations and pitfalls of a testator attempting to create trusts containing hybrid powers, mere powers or powers of encroachment on rights conferred on beneficiaries by other provisions of the will.

In traversing the provisions of the Perpetuities and Accumulations legislation, the authors probe the problems implicit in the application of the wait-and-see rule and in particular its effect on the unfortunate planner settlor. This aspect of the work concludes with an examination of the repeal in some jurisdictions of the Accumulations Act (as embodied in the Property Law Act).

A particularly pleasing aspect of the book and one sure to be appreciated by all those using the work is the willingness of the authors in discussing problems, to reach a conclusion which is set out towards the end of each passage or chapter. Frequently advice is offered to the intending estate planner. What perhaps sets the book apart as a work likely to be of great use to the practising lawyer (and perhaps for the student) is that it deals with the problems most likely to arise in practice; e.g. how the trustees who are given the very widest of discretions and powers with respect to selection of objects and the trust property are to be controlled; what is the nature of the interest of a beneficiary described as a member of a class in the discretionary trust. The last three chapters of the work are devoted to an examination of the relevant provisions of the Income Tax Assessment Act and other taxation effecting such trusts in the States of Victoria and New South Wales. Whilst, there will be found specific texts dealing with those subjects, the treatment of discretionary trusts in such texts is very often sketchy.

Gazing into the crystal ball is fraught with difficulty but many practitioners have expressed the view that litigation will increase in the area of trustees' discretions. It may well be that the authors' discussions of the powers of control by the court of trustees, in particular in case of fraud on the exercise of the power, will be prophetic. The great upsurge in the use of trusts seems certain to occupy increasingly the courts' time in the future. It may be anticipated that many allegations will be made that the trustee has exercised his power or duty without paying due regard to the rights of the various beneficiaries.

In discussing the provisions of the Income Tax Assessment Act so far as it relates to discretionary trusts employed in Australia, the learned authors examine not only Section 260 of the Income Tax Assessment Act but attempt to resolve the problems inherent in the concept of 'trust estate'. The problems implicit in the creations of such trusts under the terms of the Stamp Duty Acts of Victoria and New South Wales receive attention as well as the stamp duty effect on the exercise of discretions. The death and stamp duty implications in the creation of discretionary trusts and the effect of such duties upon the settlor and beneficiaries under such discretionary trusts completes the work.

On a technical note, the text adopts the modern system of a paragraph numbering but regrettably the index which extends to some six pages refers in general to page numbers rather than to paragraph numbers. In subsequent reprints of the book, it is to be hoped that the present system of providing practically all references within the general text will be abandoned in favour of more footnotes. At present the arrangement makes use of both systems. At times the quotation of a very large number of references tends to distract from the value of the text.

It would be easy to eulogise about a work of this kind particularly when it fills a need long felt by practitioners. The general impression is that this book is well researched and is in general easy to read. Accordingly, it will be at once accepted by the practitioner and student alike. It will be a standard requirement for any person who endeavours to specialise in the area of discretionary trusts.

M. J. WALSH*

* Barrister and Solicitor, Supreme Court of Victoria.

BOOKS RECEIVED

Unto God and Caesar: Religious issues in the emerging Commonwealth 1891-1966, by Richard Ely, (Melbourne University Press, 1976), ISBN 0 522 84093 0.

The Court as the Public Conscience: Conservation, Pollution and the Law, by R. J. K. Chapman and Derek Roebuck, (Environmental Law Reform Group, University of Tasmania, 1976), ISBN 0 9599050 4 9.

The Australian and New Zealand Journal of Criminology, edited by Dr. A. A. Bartholomew, (Butterworths Pty Ltd, Australia, 1976).

Bills of Exchange in Australia, by B. B. Riley, Third Edition by W. J. Chappenden and B. Bilinsky, (Law Book Co. Ltd, Australia, 1976), ISBN 0 455 19457 2.

Australian Government Commission of Inquiry into Poverty Series: Law and Poverty in Australia, by R. Sackville, (Australian Government Publishing Service, Canberra, 1975), ISBN 0 642 01868 5.

Annotations to Acts and Regulations of the Australian Parliament, Supplement to Commonwealth Statutes and Regulations Annotated 1901-1972, (Butterworths Pty Ltd, Australia, 1976).

Fear of Punishment, Law Reform Commission of Canada, (Supply and Services Canada, 1976), J32-4/10-1975.

How to do things with rules, by William Twining and David Miers, (Weidenfeld & Nicolson, London, 1977), ISBN 0 297 77183 3.

Time in the Performance of Contracts, by K. E. Lindgren, (Butterworths Pty Ltd, Australia, 1976), ISBN 0 409 31290 8.

Writings in Commercial and Legal Studies, edited by John Glasson, (Victorian Commercial Teachers' Association, 1975), ISBN 0 909 715 34 3.

Australian Federal Government, by P. E. Joske, (Third edition, Butterworths Pty Ltd, 1976), ISBN 0 409 37204 8.

Going to court?, by Michael Rosser, (Law Foundation of New South Wales, 1976), ISBN 0 909136 10 6.

Cases and Text on Insurance Law, by Paul Latimer, (Butterworths Pty Ltd, Australia, 1977), ISBN 0 409 30870 6.

Final Report of the Commission of Inquiry into Land Tenures, (Australian Government Printing Service, Canberra, 1976).

Manual of the Law of Income Tax in Australia, by K. W. Ryan, (Fourth Edition, Law Book Co. Ltd, Australia, 1976).

Principles of Evidence, by F. A. Bates, (Law Book Co. Ltd, Australia, 1975).

Legislative, Executive and Judicial Powers in Australia, by W. Anstey, (Fifth Edition, Law Book Co. Ltd, Australia, 1976).

Commonwealth Law Reports Index Vols. 1-127, compiled by P. H. Lane, (Law Book Co. Ltd, Australia, 1976).

A Digest of Australian Constitutional Cases, by P. H. Lane, (Law Book Co. Ltd, Australia, 1976).

Federal Law Reports Index Vols. 1-21, compiled by P. H. Lane, (Law Book Co. Ltd, Australia, 1976).

Fitzgerald and Speck, Holding Companies and Group Accounts, by Ronald L. Bowra and Frank L. Clarke, (Sixth edition revised, Butterworths Pty Ltd, Australia, 1977).

The Review, edited by Niall Macdermot, (International Commission of Jurists, Geneva, 1977).

Partition and Sale Report No. 23, (Institute of Law Research and Reform, the University of Alberta, 1977).

Revista de la Facultad de Derecho de México, (Universidad Nacional Autónoma de México, Ciudad Universitaria, México, 1976).

Law Institute Journal, edited by A. J. Ellwood, (Law Institute of Victoria, 1977).