

BOOK REVIEWS

Law of Trusts in Canada by D. W. M. Waters (2nd Ed., The Carswell Company Limited, Toronto, 1984) pp. i-cxvi, 1-1146, appendices 1149-1161, index 1163-1240. ISBN 0 459 36200 3 (bound) ISBN 0 459 36210 0 (pbk).

The publication in 1974 of the first edition of this major treatise was significant for academic lawyers in common law countries for it provided the first full and satisfying commentary on the law of trusts as applied in Canadian jurisdictions.

Professor Waters brought to his work experience as a teacher in England and Canada and a sound reputation for scholarship on trusts which was established by his monograph on constructive trusts published in 1964.

Law of Trusts in Canada is arranged under headings familiar to Australian lawyers. The special interest of the book to readers outside Canada lies in the author's thorough and instructive discussion of Canadian decisions against the background of English case law. Australian lawyers will recognize many of the contentious problems discussed by the author. Examples of these are found in the discussion of the Statute of Frauds which is still in force in some provinces and has been re-enacted in others. Canadian law reform agencies have given some attention to the Statute. A resume of the differing views of the various agencies is provided by the author. It is a pleasing feature of the work that it deals at adequate length with some questions left unconsidered in the established English works. An example is the treatment of revocable trusts. There is a chapter on the law of trusts in Quebec which should be of interest to students of comparative law. Professor Waters notes that in common law Canada today personal trusts are usually the outcome of taxation considerations. The book contains a treatment of relevant taxation law.

According to Professor Waters the employment in Canada of the trust in business is currently undergoing a great expansion. He foresees that some difficult questions will face Canadian legislators. He asks whether the fundamental principles of the law of trusts are compatible with the nature of commercial dealings. Australian experience with public unit trusts, particularly property trusts, prompts a similar enquiry here. In Australia the trust has been pressed into service as a medium to attract the investing public to commercial ventures which would be better suited by organisation as companies, were it not for the more favourable treatment of trusts by income tax legislation. The power to tax is the power to distort. To accommodate special commercial needs, public unit trust deeds commonly re-mould the rights, duties and powers of all concerned so that the exact nature of the various legal relationships is not easy to see. Professor Waters describes the real estate investment trust of the United States and Canada, which is similar to the Australian property trust, but he does not attempt analysis of the relationships involved or the investor-protection legislation applicable. One should not quarrel with that since the writing of a book confined to family trust is a large enough task. However, it is becoming apparent that if discussion of business trusts is left to lawyers unversed in the law of trusts, there is a danger that remedial legislation will take insufficient account of the principles underlying trusts and that this will eventually lead to obscurity in the relevant law. Some of the questions associated with the regulation of 'prescribed interests' by the Companies Code Part IV Division 6 might be more easily solved if the original legislation had distinguished between interests arising out of a trust — an essentially fiduciary arrangement — and other interests arising out of contract where all concerned are at arm's length. Moreover, some intriguing questions in the law of trusts arise when business trusts go sour and are affected by the trustee or manager becoming bankrupt or going into liquidation, an event more common in relation to business trusts than the traditional family trust. Truly, bankruptcy is 'the acid test of rights'.

Professor Waters has drawn upon a wide range of material: not only the very considerable bulk of Canadian decisions but also English and Australian authority as well as Anglo-American legal periodical literature. The book is very well presented.

Most academic lawyers and students will find it a stimulating reference work. It would be an exotic luxury for Australian practitioners other than those whose work throws up cases which call for research on questions not settled by local law.

H. A. J. FORD*

* Professor Emeritus of Commercial Law, University of Melbourne.