

BOOK REVIEW

MODERN TRUSTS AND TAXATION (Commercial Law in Context Series, Faculty of Law, Monash University, 1978) edited by Yuri S. R. Grbich, Gregory D. Munn and Harry Reicher; General Editor, Professor R. Baxt; pp. i-xix, 327.

There is much to be commended in both the content of this work and the enterprise which produced it. Designed as the first in a series of monographs for busy professionals working in law, accounting, economics, management or related fields, it is presented as an extension of the Continuing Education Programme of the Faculty of Law at Monash University. The general intention is to focus on practical problems of current concern to the particular profession. These are to be analyzed and discussed by qualified academics and practitioners. The General Editor indicates in a forward that it is hoped that the insights provided will be 'new, provocative and useful'.

Modern Trusts and Taxation amply displays these qualities. While it is trite to comment that the trust concept has had a long connection with tax avoidance schemes, not all of them totally disreputable, there can be few jurisdictions in which the trust has been recently employed for this purpose with such a degree of success as in Australia. In Chapter 1, which is concerned with some distinctive aspects of the law relating to discretionary trusts, Dr Grbich attributes their popularity as tax avoidance devices to 'three advantages: flexibility, procedural simplicity and the advantageous scheme of income tax on trusts'. To North American eyes, a consideration which seems just as important is the prevailing attitude of the High Court of Australia to tax avoidance schemes in general. It is fair to say that few experienced lawyers in the United States, or in Canada, would advise their clients that plans based on the kind of technical and sometimes esoteric reasoning which the High Court has accepted in recent years, would have any real chance of success. My own view is that a number of the schemes which have enjoyed great success in Australia would have an excellent chance of being laughed out of a Canadian court. If this is correct, it is also true that not all Canadian lawyers would prefer the approach of their own judges to that of the High Court. Opinions will continue to differ about the prin-

ciples which should be applied to the interpretation of taxing statutes. For obvious reasons the authors of this work were not concerned with the issue and their contributions must be judged against their essentially practical objectives.

With the virtual abolition of death duties and gift taxes and the absence of any system of taxing wealth, or even capital gains, in Australia, the main orientation of the work is directed towards the use of trusts for the purpose of avoiding income tax. An analysis of the relevant provisions of the *Income Tax Assessment Act 1936*, including the amendments of 1977 and the anti-avoidance provisions of s.260, is contained in chapters 4, 5, 6 and 10. Chapters 1, 2 and 7 are concerned with the distinguishing features of discretionary trusts, unit trusts and service trusts while, quite appropriately, chapter 8 looks at the problems involved in assignments of rights to future income. Chapters 3 and 9 are largely confined to difficulties which may arise at the creation of a trust, during its existence and on its termination. Finally, in chapter 11, Professor Baxt has added a brief but interesting discussion of a variety of legal questions which may arise from the use of 'two-dollar nominee companies' as trustees.

Despite the number of contributors (3 academics, 3 legal practitioners and 1 chartered accountant), the level of the writing is remarkably consistent and the result is a happy blend of planning suggestions and conceptual, statutory and case analysis. The style is simple and direct although the pace is fairly brisk. Subject to the reservations which must be made by a reviewer in another jurisdiction, it would seem that the utility of the work to Australian professionals engaged in giving advice on tax planning will be considerable.

It may be recalled that in his foreword, Professor Baxt expressed the hope that the insights provided by the authors would not only be new and useful but also provocative. While there is a good deal in his own contribution and in those of the other authors which will provoke thought and questions, the contributions of Dr Grbich are provocative in an additional sense. His vigorous onslaught against the course of judicial decisions interpreting s.260 is great fun to read and the busy professional should have no difficulty in pinpointing the respective positions of the High Court of Australia and Dr Grbich on its interpretation.

I am less certain that the same degree of guidance is provided in some parts of the chapter devoted to 'the mechanics' of discretionary trusts. Dr Grbich has studied and written extensively on this topic. He has constructed his own conceptual framework and, at times, is prepared to bend the case law to fit within it. For this reason the reader should be

warned that some of the propositions of law in Chapter 1 are grounded on premises which are more controversial than the text would suggest. A number of his conclusions are, for example, based on an assumption that the law does not impose any higher obligation on a trustee who holds a 'non-exhaustive' discretionary power in his capacity as trustee, than it does upon a donee of a power who is not a trustee. Although Dr Grbich's views are worthy of respect, I believe this assumption to be erroneous and, at the very least, to require some citation of supporting authorities, if there are any.

Perhaps the most important conclusion which is based on the assumption, is that a trustee, like a donee of a power who is not a trustee, is under no duty to consider whether or not to exercise a non-exhaustive discretionary power. At page 26 he cites dicta of Harman J. and Lord Reid which are inconsistent with this conclusion. These dicta, he says, are in conflict with the reasoning of other decisions which he quite wrongly, and misleadingly, suggests were concerned with powers given to trustees. While Dr Grbich's enthusiastically tendentious treatment of authorities might be enjoyed in the course of an academic disputation, it seems somewhat out of place in a work designed to give practical assistance to professionals. Certainly in Canada and, I believe, in England and Australia, a lawyer who advised a trustee that he could ignore the existence of his discretionary powers to distribute income or capital, would do well to increase the amount of his liability insurance.

Although it is believed that the above criticisms are justified, it is not intended to suggest that they detract seriously from the value of Dr Grbich's contributions and from that of the work as a whole. It is to be hoped that further monographs in the series will soon be available.

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