

TRUSTS LAW IN AUSTRALIA BY DENIS SK ONG [Australia: Federation Press, 1999.  
xl + 626 pp (including index). Hardcover: A\$95. Paperback: A\$70]

A student new to the law of trusts has a wide range of books to choose from. First on his lecturer's list would probably be the traditional English texts such as *Modern Equity* (J Martin, 15 ed (1997)) *Equity and the Law of Trusts* (P Petitt, 8 ed (1997)), *Commentary and Cases on the Law of Trusts and Equitable Remedies* (DJ Hayton, 10 ed (1996)). There are also newer books, the more interesting of which have tried to break new ground by presenting the material in a different way: *Trusts Law: Text and Materials* (G Moffat, 2 ed (1994)) and *The Law of Trusts and Equitable Obligations* (R Pearce and J Stevens, 2 ed (1998)). All of these are English, and their treatment is largely, though not exclusively, English. Given the increasing reference in our courts to cases from all over the Commonwealth, and particularly

Australia, it is perhaps surprising that no Australian text has been taken to in the same way as the English texts. There is *Equity, Doctrines, and Remedies* (RP Meagher, WMC Gummow, JRF Lehane, 3 ed (1992)), but the focus of that work is on Equity as a whole. Most Australian works that are well known, such as *Principles of the Law of Trusts* (HAJ Ford and WA Lee, Looseleaf) and *Jacobs' Law of Trusts in Australia* (RP Meagher, WMC Gummow, 6 ed (1997)), are really meant for the practitioner. There are few ready equivalents to the English undergraduate texts, save perhaps *Equity and Trusts in Australia and New Zealand* (GE Dal Pont and DRC Chalmers, (1996)). *Trusts Law in Australia* now joins that small list.

The arrangement of topics in *Trusts Law in Australia* is traditional, in rough order: the trust concept, elements of the express trust (certainty, formalities, constitution), trustees, charitable trusts, resulting trusts, constructive trusts, and tracing. This is in contrast to Pearce & Stevens and Moffat, who have in their works attempted to treat the subject in novel ways, breaking up traditional topics. It may be that keeping to the traditional division is the wiser alternative – given that most trust courses are still structured traditionally, any novel attempt of recharacterising topics in trusts may cause more confusion than is worthwhile. But it does mean that the traditional emphasis on trusts as being primarily concerned with property rather than the management functions of the trustee is perpetuated, and that care must be taken by the reader to inter-relate ideas across chapters.

As for reading and study aids, the book firstly provides chapter summaries, which are always welcome by the student, but generally less so by the tutor – too often, despite the best intentions of the author of a work, they will be about the only thing read and understood. An important aid to reading any book is the index, but unfortunately, *Trusts Law in Australia* lacks a detailed index, and there is little attempt to deal with different categorisations. What may be a good innovation is that in the table of cases, national jurisdictions are not distinguished; one may not quite remember where a particular case may come from.

The work is of course focused on Australian law, though there are references to English cases generally, and seminal English cases are discussed (and criticised) at length. It is no criticism of the work to say that there is no attempt at a systematic discussion of the law of the rest of the Commonwealth – there is usually more than enough material within a single jurisdiction to bedevil the student. Such a systematic discussion would be valuable, but cannot be the aim of an introductory work.

Australian texts do present a difficulty for the non-Australian law student – too often there is an involved examination of the statutory provisions of the different states and territories. Though these may be interesting, it can be a quagmire for the student just trying to understand the basic issues and concepts. Professor Ong avoids this by systematically arranging his discussion, and clearly marking them out.

Turning to the general tone of the work, it must be noted that it is doctrinal and positivistic. The author focuses exclusively on principles and rules in equity. Professor Ong does a good job of presenting his arguments about the application of equitable principles in various cases. The arguments used are conceptual, and make their appeal to logic, conceptual clarity and consistency.

There is nothing wrong with this in itself, but it is noteworthy that there is hardly any attempt to consider the impact of his arguments on the world at large. For instance, in the discussion of division of quasi-matrimonial property, though the exposition of the law cannot be faulted in terms of principle, there is no indication of the difficulties often faced by the (invariably) female claimant in showing detriment or common intention, and how courts sometimes, or perhaps often, manipulate such

rules by interpreting them broadly. While it is true that a trusts course is perhaps not the best place to question dominant societal values, such as the difficulties faced by female co-habitees, it is important for the trust student, particularly the novice, to understand the impact rules and principles will have on people in their lives, and that there may be a need to evolve new principles or adapt existent ones to better serve the ends of justice. *Trusts Law in Australia* presents the law of trusts as if none of these concerns were pertinent. It would thus seem to the novice reader that trusts law exists in a world of its own, untouched by untidy reality.

*Trusts Law in Australia* thus stands in contrast to efforts such as that of Moffat, and Simon Gardner (*An Introduction to the Law of Trusts* (1990)) in trying to present trust law in the context of social issues and problems. And even the traditional English texts such as J Martin's make constant references to such issues, and the need to bear them in mind in evaluating the law. The benefit of such an approach is simply that students of the law of trusts are able to see the background to and justification of principles developed by the courts. They are thus able to evaluate such principles. While it is undoubtedly true that doctrinal rules have to be learnt by the law student, it is suggested that a legal education cannot be complete without making it clear to her that legal rules may not be able to serve all the interests at hand, and that all too often principles developed by the courts fall short of meeting the ends of justice. It is a poor law student who is unable to suggest what the law should be; and a poor law student invariably turns into a poor lawyer.

A purely doctrinal approach merely critiques the law in terms of logic and conceptual clarity and consistency, which is not the end all of the law; the law is not a branch of mathematics. With respect, *Trusts Law in Australia* does not fulfil what is required of a trusts text for the undergraduate.

It is also noteworthy that there is little or no reference to concepts of unjust enrichment or restitution. No doubt there is little room in most trusts texts to deal with issues of trust law, let alone unjust enrichment. But given that courts, readily refer to such notions, and that various equitable doctrines are being re-evaluated in light of ideas in unjust enrichment (see for example, Lord Nicholls, "Knowing Receipt: The Need for a New Landmark" in WR Cornish *et al* ed, *Restitution: Past, Present and Future* (1998)) some reference must and should have been made to it, at the very least to familiarise the student with the use of such ideas in areas traditionally governed by trusts law. For instance, the work of Peter Birks and Robert Chambers on resulting trusts and Lionel Smith on tracing are not referred to.

It is also disappointing that there is little reference in the work to articles. If students are to be taught to accept that there are many ways of looking at legal problems, and indeed that there has to be consideration of opposing views, then they must be exposed to it in the texts that they are expected to use. But there is a dearth of such references in Professor Ong's book.

Professor Ong's views regarding many cases are valuable, and will have to be considered carefully by anyone working in the area. But this reviewer is doubtful that it should be used by a novice student. *Trusts Law in Australia* is more of a compliment to the usual trusts texts, than a substitute, at least outside Australia.

AEDIT ABDULLAH