

Which Books To Buy On Trusts?



There has been a recent flurry of publishing of texts about trusts. I cannot claim to have read every word in the texts discussed in this article, so the review is based on sampling rather than a full reading. Examples of some of these publications recently published about trusts that have come to my attention are:

1. Trusts: In Principle [Review copy]. Douglas R and Knowler J, *Trusts: In Principle*, Lawbook Co., Sydney, 2006. Roger Douglas - Associate Professor, School of Law, Latrobe University; Jane Knowler - Lecturer, School of Law, Flinders University of South Australia. 191 Pages. RRP \$59.95 (AUS).

This short book is useful for students and non-practitioners needing a basic understanding of trusts law.

It refers heavily to *Jacobs' Law of Trusts in Australia* sixth edition¹ - unusually because there is a seventh edition² reviewed by the writer in this journal recently.

It is brief, to the point where it only discusses two powers of trustees and three rights of trustees and the only right of beneficiaries written about in any detail is the right to extinguish the trusts. All of the other rights are summarised in eight lines.

This is not a criticism as at the end of the end of this Chapter there are references to five different texts or articles for further reading.

Many of the chapters rely heavily on the reader undertaking further study, usually from *Jacobs' Law of Trusts in Australia*,³ *Equity and Trusts in Australia*,⁴ or *Equity and Trusts: Commentary and Materials*.⁵

Its ease of use is evidenced by how easy it was to find the basic rules about the three certainties of trust.

Gino Dal Pont has also published a similar book as a preliminary text⁶ which one of my employees has commented is easy to use with the more comprehensive and detailed texts.

If you know a student about to undertake a course in trusts, this reviewed book could be usefully given to them as some preliminary reading.

2. Trusts Law in Australia [Review copy]. Ong D S K, *Trusts Law in Australia*, 3rd ed., The Federation Press, Sydney, 2007. Denis SK Ong - Professor in Law, Bond University. 739 Pages. RRP \$99.00 (AUS).

It is difficult to recommend this book to practitioners. It looks like an overdeveloped set of student notes,

and on a value basis for practitioners it is probably not worthwhile. For example, at page 32 the discussion on Romalpa Clauses starts with the very chatty 'In an age where insolvencies are by no means uncommon...'

By way of testing the book, I looked for any significant discussions about Prescribed Private Funds (PPFs). PPFs are in essence private charities driven by tax legislation in Australia. I could see no evidence of this form of charitable trust being discussed at all. The PPFs commenced as an efficient tax deductible charitable trust on 30 June 2007 and the book is only current to 1 June 2007 but at that time it was known that PPFs were about to come into existence.

The book has, however, received significant praise from other reviewers.⁷ One useful feature is the summary of material that appears at the end of each chapter.

My guess is that the book will be extensively purchased by those undertaking law courses where it is the prescribed text.

The money saved by not buying this book could be better spent on buying *Jacobs' Law of Trusts in Australia*,⁸ as it is far easier to read.

3. Lewin on Trusts [Reviewer's own copy]. Mowbray et al., *Lewin on Trusts*, 18th ed., Sweet & Maxwell Ltd., London, 2008. John Mowbray - Benchet of Lincoln's Inn; Lynton Tucker - Barrister of Lincoln's Inn; Nicholas Le Poidevin - Benchet of Lincoln's Inn; Edwin Simpson - Barrister of Lincoln's Inn; James Brightwell - Barrister of Lincoln's Inn. 2032 Pages. RRP \$867.00 (AUS).

It is a difficult choice to know whether to recommend *Lewin on Trusts* over *Underhill and Hayton: Law of Trusts and Trustees*⁹ or vice versa.

With the five authors of *Lewin* all practising at the Bar in London as well as internationally in common law jurisdictions where many trust matters come to court, such as in the Channel Islands, the Isle of Man, and the Carribean, it is interesting to see that the writing style appears to be consistent throughout the book.

It is clear and to the point. The

clarity of the language is impressive. An example of this at page 81 where a discussion about payment of debts and secret trusts in wills occurs is:

'When a question arises as to the order of application of the assets of an estate, a gift by way of secret trust falls to be treated as if it were contained in the will. And so a gift of part of residue stands in the same position as a specific bequest of that part, and the debts will be paid first out of the remainder of the residue'

Re Maddock [1902] 2 Ch. 220, CA; *Administration of Estates Act 1925*, s 34 (3), Sch 1.¹

The only criticism I have of the book is that the paper is biblically thin, although given the number of pages it is understandable why. It is not light bedside reading in more sense than one.

The breadth of the undertaking of the writers can be seen in Chapter 10 'Creation of Trusts by Contract' where there is a discussion about the lack of there being any need in mutual wills, for the benefits to be similar in each will. The case citations in this chapter include *Birmingham v Renfrew*¹⁰ (a Victorian case, heard on appeal in the High Court); *Re Newey (Deceased)*¹¹ (a New Zealand case); *Bigg v Queensland Trustees Ltd*¹² (a Queensland case); *University of Manitoba v Sanderson Estate*¹³ (a Canadian case); and *Barns v Barns*¹⁴ (an Australian High Court case), as well as numerous UK cases and cases in other jurisdictions.

The section within Chapter 10 on 'Mutual Wills' runs for 12 pages, covering 32 tightly packed paragraphs.

It was also interesting to see that in Part 3 of Chapter 23 on the trustees duties to notify beneficiaries of their interest¹⁵, there is a discussion of the New Zealand case of *Foreman v Kingstone*¹⁶ which interestingly is not cited in the judgment of Gzell J in the recent New South Wales case of *Avanes v Marshall & Ors*,¹⁷ involving beneficiary rights.

4. Underhill and Hayton: Law of Trusts and Trustees [Reviewer's own copy]. Hayton D J, Matthews P B, and Mitchell C C J, *Underhill and Hayton: Law of Trusts and*

Trustees, 7th ed., Lexis Nexis Butterworths, Chatswood, 2007. David Hayton - Justice of the Caribbean Court of Justice, Additional Benchers of Lincoln's Inn and Fellow of King's College, London; Paul Matthews - Professor of Law, King's College, London, Solicitor of Withers London, and HM Coroner City of London; Charles Mitchell - Professor of Law, King's College, London. 1359 Pages. RRP: \$ 890 (AUS).

Like *Lewin on Trusts*, this is a text with a long history.

I have a slight preference for *Underhill*, but I think that only derives from owning an earlier edition for a long time.

What I like about *Underhill* is the easy way in which it sets out a proposition and then goes on to discuss the ramifications of the proposition, the exceptions to it, and other related aspects of the proposition.

The 12th edition of *Underhill* contains the formulation of the proposition at the commencement of each chapter which then goes on to set out an article or series of articles. The 'article' contains a discussion about the legal proposition. This tradition continues in the present edition. Even the most complex topics are dealt with in simple language.

5. Trusts & Estates: Taxation and Practice [Reviewer's own copy]. Marks B, *Trusts & Estates: Taxation and Practice*, Taxation Institute of Australia, Sydney, 2007. Bernard Marks - A Melbourne based lawyer specialising in Federal Tax issues. 135 Pages. RRP: \$ 330.00 (AUS).

Unusually this book does not have page numbers except for page numbers for chapters.

This book is very comprehensive and

is of the usual high quality of text published by the Taxation Institute of Australia.

It even includes a discussion of some of the tax issues arising from superannuation - for example 'taxation of lump sums paid to members before death' and 'payments to non-dependants'.

At 'Part J' there is also a useful discussion about testamentary trusts - essential reading for anyone drafting will trusts, or relying on other drafter's precedent packages for drafting will trusts.

Conclusion:

Both *Lewin on Trusts* and *Underhill* are expensive by Australian textbook standards, however, one of them, along with Dal Pont¹⁸, and *Jacobs' Law of Trusts in Australia*¹⁹, should probably form the essential trust library of practitioners who have a professional interest in trusts. Bernard Marks' book, *Trusts and Estates: Taxation in Practice*,²⁰ is also needed because of the way that tax impinges on trusts.

It is expected that a book by James Kessler QC, who is up to his eighth edition of his UK text²¹ on drafting trusts and will trusts will be available in the first Australian edition later this year at around the time that he visits Australia. Kessler's highly praised UK texts are useful in an Australian context once you remove the material that relates to UK taxation. I advise that this upcoming Australian edition should be watched out for.

Note:

Practitioners should also be aware of Ford H A J and Lee W A, *Principles of the Law of Trusts*, 3rd ed., LBC Information Services, 1998 (Loose leaf Service), which I find useful in practice - but which I have not reviewed for the

purposes of this article.

I would like to thank Kate Moss, a graduate law clerk working in my office, for her assistance with this article.

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1. Jacobs, K S, *Jacobs' Law of Trusts in Australia*, 6th ed., Butterworths, Sydney, 1997
2. Heydon J D and Leeming M J, *Jacobs' Law of Trusts in Australia*, 7th ed., Lexis Nexis, Sydney, 2006
3. Note 1.
4. Dal Pont G E and Chalmers D R C, *Equity and Trusts in Australia*, 3rd ed., Lawbook Co., Sydney, 2004
5. Dal Pont G E, Chalmers D R C and Maxton J, *Equity and Trusts: Commentary and Materials*, 3rd ed., Lawbook Co., 2004
6. Dal Pont G E and Cockburn T, *Equity and Trusts: In Principle*, Lawbook Co., Sydney, 2005
7. For example, see the book review of Warnock R (2008), Inprint, *Law Instituted Journal*, 82 (3), 1 - 113 at 77.
8. Note 2.
9. Hayton D J, Matthews P B, and Mitchell C C J, 7th ed., *Underhill and Hayton: Law of Trusts and Trustees*, Lexis Nexis Butterworths, Chatswood, 2007.
- 10.[1937] HCA 52; (1937) 57 CLR 666 (2 September 1937)
- 11.[1994] 2 NZLR 590
- 12.[1990] 2 Qd.R. 11
- 13.(1998) 155 D.L.R. (4th) 40
- 14.*Barns v Barns* (2003) 196 ALR 65
15. See pp 793 - 834
- 16.(2003) 6 I.T.E.L.R. 841 (N.Z.H.C)
- 17.[2007] NSWCA 191 (7 March 2007)
18. Dal Pont G E and Chalmers D R C, *Equity and Trusts in Australia*, 3rd ed., Lawbook Co., Sydney, 2004; Dal Pont G E, Chalmers D R C and Maxton J, *Equity and Trusts: Commentary and Materials*, 3rd ed., Lawbook Co., 2004.
19. Note 2.
20. Taxation Institute of Australia, Sydney, 2007
21. Kessler J, *Drafting Trusts and Will Trusts*, 8th ed., Sweet & Maxwell, Sydney, 2007. 554 Pages. RRP: \$374.00 (AUS).

followed by ten chapters contributed by separate authors covering specific aspects of appellate work. Sydney Tilmouth QC's chapter on 'Notices and grounds of appeal' and G E Dal Pont's chapter on 'Costs' are two examples of the range of issues covered.

Jennifer Hedge provides a very detailed and technically rich discussion of what should be included in appeal papers. Ian Freckelton SC's chapter gives a useful summary of the law and practice surrounding the always vexed question of further evidence on appeal. Two senior judges, The Hon Margaret McMurdo AC, President, Queensland Court of Appeal and The Hon James Douglas of the Queensland Supreme Court, contribute helpful chapters on written and oral advocacy.

Of course, as is almost inevitable with a book made up by contributions from many authors, there is some repetition and some chapters fit more comfortably into the thematic of the book than others—but these are, in the main, minor

objections that go to lesser enjoyment of reading rather than the book's utility.

However, because of such considerations, this book reaches neither the consistent standard nor the thematic unity that Jeremy Curthoys and Christopher Kendall achieved in their landmark contribution to Australian legal practice literature in 'Advocacy—An Introduction Lexis Nexis Butterworths, 2006' (reviewed in a previous Law Letter).

But that is too high a bar for a reviewer to set. It is a bar that is never going to be got over in a book of this kind.

Judged on its own terms *Appellate Practice* contains an excellent and comprehensive compilation of essays written by well chosen contributors. The result is, as the Chief Justice very accurately summarised, a book that is unique in the range of topics it addresses and a 'timely and welcome addition' to the resources of any lawyer venturing into appellate advocacy.

Appellate Practice
Graeme Blank and Hugh Selby
Published by The Federation Press
245pp \$174.95

Reviewed by Duncan Kerr SC MP

The Chief Justice of the High Court of Australia, the Hon Murray Gleeson AC contributes a short foreword to *Appellate Practice* that concludes as follows:

'This book, which includes the contributions of a number of experienced authors on matters of importance to the appeal process, has a strong practical flavour. So far as I am aware, in the past there has not been a practice book that covered the range of topics it addresses, and I expect that practitioners will find it a timely and welcome addition to their resource materials.'

The book has all those merits. It is generally well organised. It begins with two very useful introductory chapters 'What is an appeal?' and 'Frequent issues' contributed by the joint editors Graeme Blank and Hugh Selby. Those essays are