Book Review

Commercial Trusts by Nuncio D'Angelo (2014), LexisNexis, 434 pp, ISBN 9780409338812

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The Preface to Penner's introductory text *The Law of Trusts* opens with the inimitable observation that 'Trusts is a gripping subject; unfortunately it grips most students with anxiety'.[1] Teachers of the law of trusts know this to be true. They labour dutifully to organise, illustrate and explain this allegedly arcane and intricate body of law for students with the benefit of standard, somewhat homogenised texts.

At one level, D'Angelo's new book, *Commercial Trusts*,[2] will not assist this enterprise. Despite its promising title, as the author repeatedly notes, the book is not a textbook in the standard sense. It is not an attempt to map or even describe the law of commercial trusts generally. It directly considers only a narrow, almost uniquely Australian genus of trust — that in which a corporate trustee administers a unit trust specifically dedicated to risk-taking activities of a commercial (business or investment) nature. Moreover, and contrary to the marketing summary on the rear cover, *Commercial Trusts* is by no means comprehensive even within that scope. It focuses on and excavates very capably certain contemporary issues — such as the potential for beneficiaries to be liable to third parties for debts incurred on their behalf in the administration of the trust; the limits and threats to trustees' right to indemnity; and the effectiveness of limitation of liability clauses — but leaves untouched other important aspects of the administration and enjoyment of trusts. A textbook could not afford that partiality. Finally, D'Angelo focuses attention on the presence of conflicting authority, on ambiguity and on residual uncertainty, where most aspiring didacts seek to project clarity and confidence, even where such attributes are misleading.

At a different, deeper level, however, *Commercial Trusts* has a great deal to offer a student of the law of trusts. It is a thorough examination of the way in which issues familiar to the trust law cognoscenti conspire to allocate financial risk between the parties in and around commercial trusts. D'Angelo contends, but does not attempt to substantiate empirically, that those allocations may not be fully appreciated by the parties. He also contends that it would be more 'efficient' if standard rules dealing with the issues were imposed by statute.

The fact that *Commercial Trusts* is not intended as a textbook is evident in its structure. The book departs from the orthodox approach to presentation of the

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1 J E Penner, *The Law of Trusts* (Oxford University Press, 9th ed, 2014), Preface.

2 Nuncio D'Angelo, *Commercial Trusts* (LexisNexis, 2014).

law of trusts, in which the explication moves inexorably from formation of the trust, to the duties of trustees, the rights of beneficiaries to the remedial consequences of breach. It opens, in Chapter 1, with an introduction to the institution under examination, the commercial trust, and the key concepts employed in later chapters. Chapter 2 then provides an historical context for the uniquely Australian legal phenomenon, loosely relying on the concept of 'regulatory arbitrage' as the motive force for what is presented as an evolutionary process. Chapters 3–5 are the substantive heart of the thesis; they deal successively with the legal risks faced by the different classes of actors in and around the trust: the beneficiaries, the trustee and third parties contracting with the trustee as trustee. In each case, the position is expressly contrasted with the position of the analogous class of actor in a limited liability corporation. Chapter 3 describes the position of the beneficiaries (as 'equity' investors) of a commercial trust, noting in particular the various ways in which beneficiaries can be either directly or indirectly liable to third parties dealing with the trustee in the administration of the trust. Chapter 4 describes the potential liability of the trustee to the beneficiaries of the trust and also to creditors whose claims arise as a consequence of the trustee's administration of the trust. It identifies, in particular, the dangers faced by trustees relying on contractual means to limit their personal liabilities in respect of creditors and other external parties. Chapter 5 describes the risks faced by third parties dealing with trustees and identifies a number of 'jurisprudential peculiarities' that render the creditor more vulnerable than they would be if dealing with a limited liability corporation acting on its own behalf. Chapter 6 then describes the challenges arising when the liabilities associated with the administration of a commercial trust exceed the trust assets, a situation analogous to (but different in important respects from) the insolvency of a legal entity. Chapter 7 concludes by offering suggestions for reform. It concludes that targeted statutory intervention would be the most effective means of addressing the uncertainties and shortcomings identified in Chapters 3–6.

The book, then, is a sustained argument in support of the author's central thesis: that the participants involved in and around commercial trusts are exposed to risks of which they are (perhaps) unaware and against which they may have little ability to protect themselves. Each part of D'Angelo's argument is founded on rigorous doctrinal research, directed and conditioned by the considerable practical professional experience of its author. Those individual pieces of analysis have value in their own right, and in many cases are directly applicable to types of trust not expressly within D'Angelo's narrow definition of a 'commercial trust'. Together they highlight the complexity of the matrix of accountabilities in and around those types of trusts. Helpfully, D'Angelo provides practical examples of draft clauses and other means of addressing some of the issues identified in the analysis.

There is also value in the historical analysis presented in Chapter 2, albeit D'Angelo disclaims any notion that the analysis qualifies as legal history per se. Similarly, the recurrent comparison to developments in the United States — where the historical development of both the law of trusts and of corporations has differed in important respects from the experience in Australia — is illuminating.

The argument advanced by D'Angelo for targeted statutory intervention is however, with respect, slightly less persuasive. The book argues persuasively that commercial trusts ought to be re-embraced into the broad family of business associations. In support of this proposition, D'Angelo identifies the functional similarities between the arrangements he groups under the rubric 'commercial trusts' and the limited liability corporation. Both arrangements permit individuals to pool their capital with others in pursuit of commercial opportunities, and to focus management responsibility for that pursuit in the hands of specialists. He further identifies that the process of development of the incorporated form in English law was entangled with arrangements in many ways similar to, and precursors of, modern commercial trusts. He draws on the work of Harris,[3] in particular, to argue that market participants (primarily capital-seeking industrialists, from his account) engaged in regulatory arbitrage that inspired and ultimately catalysed the steps taken in parliament and the profession to develop the various forms of business association recognised today.

The reason this line of argument is problematic is that regulatory arbitrage is, by definition, catalysed by informed actors (and their lawyers). Just as important, it relies crucially on differentiation. Those who choose not to use the standard structure, in this case the corporation, do so for a reason. The harmonisation sought by D'Angelo, by which the alleged shortcomings of trust law would be resolved by the statutory imposition of corporation-like regimes and solutions, would reduce that differentiation. Moreover, if there is indeed an information asymmetry that permits trust promoters to hoodwink capital providers (equity holders and creditors) into misunderstanding the risks they face in the structure, those same promoters will simply react to this new set of rules by sidestepping them. As Getzler[4] has demonstrated, it is seemingly in the DNA of trust lawyers to engage in a 'cautelary' process in which they react and adapt both to emerging market needs and to developments in the general and statute law.

That is not to say that the idea of statutory intervention along the lines proposed by D'Angelo is not an admirable idea. There are ready analogues; there are statutory regimes in each of the managed investment scheme and superannuation arenas, each tailored to provide a carefully conditioned and calibrated set of protections for individuals involved. Both modify, supplement and buttress the law of trusts but, crucially, they do so in a way that respects (and indeed relies on) the key modalities of the law of trusts. Importantly, also, the contexts in which individuals are most vulnerable are the most regulated. The *Superannuation Industry (Supervision) Act 1993* (Cth) and its attendant regulatory regime addresses many (though not all) of the issues identified by D'Angelo. It does so because the beneficiaries in those trusts are not there entirely by choice; the Superannuation Guarantee more or less requires them to be a member of a fund. Similarly, unitholders of managed investment schemes — less vulnerable than super fund members, but still vulnerable to the potential for

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[3] Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720–1844* (Cambridge University Press, 2000).

[4] Joshua Getzler, 'Legislative Incursions into Modern Trusts Doctrine in England: The *Trustee Act 2002* and the *Contracts (Rights of Third Parties) Act 1999*' (2002) 2(1) *Global Jurist Topics*.

sharp practices by fund promoters — enjoy a range of protections under the *Corporations Act 2001* (Cth). D'Angelo's observation that there are vulnerable participants in the commercial trust arrangements that he has seen suggests that there may be an opportunity to craft a not overly intrusive statutory regime to govern aspects of those arrangements also. But we should not deceive ourselves; there will always be those who choose to 'swim outside the flags'. If that choice is motivated by sharp practice, either by the promoter or a retained adviser, then the appropriate focus of regulation may be that third party, not the product or arrangement per se. Beyond that, the warning 'caveat emptor' seems apt.

What, then, to make of *Commercial Trusts*? It is a reminder, if one is required, that one should not judge a book by its cover. A less ambitious title and cover description, though less commercially attractive to a publisher, might more faithfully prepare the reader for what is to come. However, that quibble ought not to obscure the worth of *Commercial Trusts* in recording, describing and analysing certain intricate aspects of the law of trusts. In an age of internet search and legal databases, there is a real danger that important material embedded within longer monographs will fail to attract the attention it deserves. On the other hand, the monograph form enables the author to present the ideas together and in context, an opportunity the worth of which is amply demonstrated here. Perhaps just as important, *Commercial Trusts* demonstrates the value that an alternative perspective can provide. If that alternative perspective can encourage lawyers across the profession and in the academy to recognise the inevitable limitations of the traditional methods of articulating the law of trusts, then *Commercial Trusts* will have value far beyond the not inconsiderable substance of its analysis.