

AUSTRALIAN TAX REVIEW

Volume 41, Number 3

August 2012

EDITORIAL

A matter of trust	117
--------------------------------	-----

ARTICLES

Sham trusts – *GT Pagone*

This article considers the development of the “sham” doctrine in Australian law. The legal meaning and application of sham in Australia is contrasted with the economic substance doctrine of the United States. The elements that constitute a sham trust are explored and in particular the necessity to be able to identify the relevant shamming intention within a transaction. Whether it is the objective intention or the subjective intention that needs to be determined is considered through a review of relevant case law and in particular the High Court decision <i>Raftland Pty Ltd v FCT</i>	119
--	-----

International tax policy: A view from the United States – *H David Rosenbloom*

Against the background of a dysfunctional political system and seriously dated international tax policies and processes, this article describes some of the major choices facing decision-makers and proposes specific steps toward an improved international tax system for the United States. Based on a lecture delivered in Melbourne in August 2011, the article is strongly influenced by the debt ceiling debate which was then reaching a frenzied crescendo in the United States. Although that particular crisis has since receded from the front pages, other senseless political debates have taken its place, leaving no greater reason for optimism than last year. The author offers his observations in the face of the prevailing winds, noting that “the Dark Ages did eventually give way to the Renaissance”.	128
---	-----

Considering the taxation implications of Australia’s carbon pricing mechanism – *Celeste M Black*

With the commencement of the carbon price on 1 July 2012, new Division 420 operates with respect to transactions involving Registered Emissions Units. Although the carbon price will initially only apply to approximately 500 entities based on Government estimates, Division 420 also covers units issued under the Carbon Farming Initiative and, once trading in Australian carbon units commences in 2015, investors will also be subject to these rules. This article provides an analysis of the new provisions and highlights practical aspects of their operation in light of the features of the carbon pricing mechanism and the industry assistance measures provided under the Clean Energy Plan.	136
---	-----

Tossing the coin: A quantitative analysis of tax decisions 2001 to 2010 – *Jeremy Hirschhorn and Alison Chen*

Whether a tax decision (or judge, or court) is “good”, and to what extent, is a matter of great interest to tax professionals, and will often be the topic of much discussion. Most analysis of tax cases is qualitative, in that it critiques the quality of the judicial reasoning in the immediate matter. An alternative method of looking at performance is to discard the quality of the reasoning, and simply look at results: was the decision ultimately upheld? This analysis assumes that the ultimate decision-maker makes the “correct” decision. Of course, the formal “ultimate decision-maker” in tax matters is the High Court. However, in the practical sense, the much more common ultimate decision is the decision by a party not to appeal a judgment against that party. The paper summarises a quantitative analysis of Federal Court tax decision making over the last decade, and identifies interesting trends in that decision making, examining both trends at a court level; and trends at the level of individual Federal Court judges.

154