

CRITIQUE AND COMMENT

TRUSTS AND STATUTES

THE HON CHIEF JUSTICE
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Coherence between the common law and statute is an aspiration which has been the subject of lively debate in relation to the law of trusts. The adoption of equity in Australia's colonial courts brought with it a history of trust law entangled with statutes, dating back to the emergence of the medieval use. This article traces the historical interaction between the statutory and non-statutory law of trusts and examines the quandaries which arise from the statutory development of the concept of the trust in ways never contemplated by the early courts of equity. The numerous contemporary intersections between statutes and the general law of trusts continue to pose challenges for the aspiration of coherence in the law.

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I INTRODUCTION

In September 2012, Professor Harold Ford AM died and Australia lost a great legal thinker, teacher and law reformer in the fields of corporations and trusts which are so central to the commercial life of the nation. Professor Ford's association with Melbourne Law School dates back to his enrolment in 1936 in the articulated clerks' course and extended over the years that followed to his appointment as Professor of Commercial Law in 1962 and his service as Dean

* Chief Justice of the High Court of Australia. This speech was delivered at the Harold Ford Memorial Lecture, Melbourne Law School on 20 May 2015.

of the Law School in 1964 and from 1967 to 1973. His name is a familiar one to law students, legal practitioners, judges and academics throughout Australia. His legacy of clear exposition in the field of corporations law and trust law is substantial and secure.

When leading thinkers of the legal academy depart this life the wavefronts of development of the subjects in which they were leaders roll on inexorably. New cases are decided — new statutes are enacted. Sepia tones sometimes seem to settle on their writings. Yet there is to be found in them much wisdom and the foundation for a more enlightened understanding of current developments. Harold Ford's legacy is of that durable character and includes the textbook on the *Law of Trusts* which bears his name and that of Professor Lee.¹ It is an honour to have been invited to deliver this lecture in his memory.

I want to say something tonight about trusts because it was a field in which Harold Ford was pre-eminent. I also want to say something about statutes, because they are part of the history of the law of trusts, part of its present and its future.

II THE ASPIRATION OF COHERENCE

The particular interactions between statutes and the non-statutory law of trusts can be located on the larger canvas of the relationship between the common law, used in its broadest sense, and the statute law generally, a relationship which Gleeson CJ once described as 'symbiotic'.² Statute law may drive or inform the development of the common law and vice versa. The emergence of the medieval use as the precursor to the trust in England is an example of the first proposition. Statutes may displace common law rules or modify them or substitute new rules for them. They may incorporate common law concepts unchanged or incorporate them and alter their content. They may, through insufficient understanding of the common law, unintentionally distort it. Professor Ford wrote in 1985 that if discussion of business trusts were left to lawyers unversed in the law of trusts, there was a danger that remedial legislation would take insufficient account of the

¹ Harold Ford et al, Thomson Reuters, *Ford and Lee: The Law of Trusts* (at September 2015).

² *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 532 [31].

principles underlying trusts and that would eventually lead to obscurity in the relevant law.³

The evolution of statute law does not follow a seamless trajectory of improvement. When a statute concerns a topic which engages conflicting societal interests it may reflect compromises made to accommodate them. With such accommodation there may come a degree of what is politely called 'internal tension'. If not 'always thus' it has been 'a long time thus'. Sir Owen Dixon remarked in an address to the Medico Legal Society of Victoria in 1933, that the methods of a modern representative legislature and its preoccupations may be an obstacle to scientific or philosophical reconstruction of the legal system.⁴ While still true today, that is not a matter for complaint. One might as well complain about the weather. It is an incident of our democratic system. As Katy Barnett and Michael Bryan said in a paper delivered at a conference on the topic of equity and statutes in February this year, 'legislating is a funny business'.⁵

Coherence within and between the common law and the statute law is an aspiration. It is, however, an under-defined and under-studied aspiration. Fitting the common law and statute together as a system of law is an heroic task and the search for coherence may involve a narrow focus applied to particular cases. In our federation for which the High Court asserts and declares from time to time one common law, the interaction of the statutes of different polities with that common law may raise a question whether coherence is able to be explored at all outside the scope of federal or uniform legislation and within each of the individual polities of the Commonwealth. The point is illustrated by the enactment, for Commonwealth legislative purposes, of the *Charities Act 2013* (Cth) ('*Charities Act*'). The preamble to that Act, and we all know how important the preamble to a charities' statute can be, says, inter alia:

³ H A J Ford, 'Book Review: *Law of Trusts in Canada* by D W M Waters' (1985) 15 *Melbourne University Law Review* 409, 409.

⁴ Sir Owen Dixon, 'Science and Judicial Proceedings' in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (William S Hein, 2nd ed, 1997) 11, 11.

⁵ Katy Barnett and Michael Bryan, 'Lord Cairn's Act: A Case Study in the Unintended Consequences of Legislation' (2015) 9 *Journal of Equity* 150.

Until now, the meaning of charity in Commonwealth law has largely been that of the common law, based on the preamble to the *Statute of Charitable Uses 1601*.

Modern, comprehensive, statutory definitions of charity and charitable purpose, applying for the purposes of all Commonwealth law and ensuring continuity by utilising familiar concepts from the common law, will provide clarity and certainty as to the meaning of those concepts in contemporary Australia.

The Act, which contains a wide definition of ‘charitable purposes’, interacts with an Australian common law that is neither Commonwealth nor state. That interaction was considered in a paper delivered at the February conference by Matthew Harding who drew attention to the difficulties in reconciling a single legal concept of charity for the purposes of Commonwealth taxation laws with the notion of a charity for the purposes of the non-statutory law of trusts.⁶ He posed the question whether courts of the future might develop equity jurisprudence in cases arising under state law which incorporates the non-statutory doctrines relating to charitable trusts so as to bring that jurisprudence into alignment with the *Charities Act*. He also asked whether such a pattern of influence is desirable or whether the legal conception of Commonwealth law should be allowed to diverge from the legal conception of charity for the purposes of state law. Those are both important questions.

I will have a little more to say later in this lecture about the historical interaction between the *Statute of Charitable Uses 1601*⁷ and the non-statutory law of trusts. Needless to say, the questions raised by the *Charities Act* and discussed in the Harding paper could come before the High Court at some time in the future, a prospect which enables me to stop with the identification of the question and avoid having to answer it.

The subject of coherence in this context was also considered in a thoughtful paper by Elise Bant who asked whether in Australia there has been an unduly restrictive approach to the analogical development of the common law by reference to statute.⁸ That and many other writings, including the other papers delivered at the conference, indicate that the general question of the

⁶ Matthew Harding, ‘Equity and Statute in Charity Law’ (2015) 9 *Journal of Equity* 167.

⁷ *Statute of Charitable Uses 1601*, 43 Elizabeth 1, c 4 (‘*Statute of Charitable Uses 1601*’).

⁸ Elise Bant, ‘Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence’ (2015) 38 *University of New South Wales Law Journal* 367.

interaction between, and the coherence of, the statute and non-statutory law generally and specifically in the field of equity is a matter of lively and ongoing interest to the academy, the judiciary and the profession.

Incoherence was no doubt uppermost in the mind of the late Professor Atiyah in his 1984 Chorley Lecture when he said rather bleakly: 'All lawyers, of course, know that large areas of both the common law and the statute law are a shambles, but is it one shambles or are there two?'⁹

Turning to what he might have called 'the first shambles', it is appropriate to begin by asking how the non-statutory law of trusts fits into the designation of 'common law' and specifically the common law of Australia.

The common law is a protean concept which is used in more than one sense. In a case decided in 2012, which concerned the subject of rape in marriage in South Australia in 1962 and what, if anything, the common law had to say about it at that time, a majority of the High Court referred to five senses in which the term 'common law' can be used.¹⁰ They were taken from Professor A W Brian Simpson's essay in the *New Oxford Companion to Law*.¹¹ They were:

- 1 The primary sense of non-statutory law which was common throughout the realm of England and applicable to all, rather than local or personal in its application.
- 2 The second institutional sense of the body of law administered in England by the three royal courts of justice, the King's Bench, Common Pleas and Exchequer Courts, until the third quarter of the 19th century.
- 3 The third, related institutional sense, distinguishing the law administered by the royal courts of justice from the principles of equity administered by the Court of Chancery, the law administered by ecclesiastical courts until 1857, and the law administered by Admiralty Courts.

As used in its third and institutional sense, the common law had its roots in old law, that which was 'supposed to have been established from time

⁹ P S Atiyah, 'Common Law and Statute Law' (1985) 48 *Modern Law Review* 1, 1.

¹⁰ *PGA v The Queen* (2012) 245 CLR 355, 370 [20] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

¹¹ A W Brian Simpson, 'Common Law' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press, 2008) 164, 164–6.

immemorial'.¹² The rules of equity, including the law of trusts, were distinguished from the 'common law' in that sense because the rules of equity were, as Jessell MR said in 1880 invented, 'altered, improved, and refined from time to time'.¹³

- 4 The term 'common law', however, evolved to a fourth and wider sense referring to law based on judicial decisions as opposed to analysis and exposition in authoritative texts.
- 5 In its fifth sense, related to the fourth, the term 'common law' came to mean the judge-made law.

The common law, used in the broad sense of judge-made law, may be taken to have included equity and, with it, the law relating to trusts. That nominal assimilation found statutory expression in s 51AA of the *Trade Practices Act 1974* (Cth), now s 20 of the Australian Consumer Law in sch 2 of the *Australian Competition and Consumer Act 2010* (Cth), which provided that:

A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

The reference in s 51AA to the 'unwritten law' was described in the High Court in 2003 as a reference to 'the principles of law and equity expounded from time to time in decisions respecting the common law of Australia'.¹⁴

The various senses in which the term 'the common law' is used directs attention to the question — how did equity and with it the law of trusts come to Australia; did it travel here as part of the common law?

A general proposition dating back to the 18th century, was that the common law of England applied to settled colonies to the extent applicable to their conditions and the terms of the charters or instruments providing for their government. It has been traced to an opinion given by counsel to the Board of Trade and Plantations in London in 1720: 'Let an Englishman go where he will ... he carries as much of law and liberty with him as the nature

¹² *Re Hallett's Estate; Knatchbull v Hallett* (1880) 13 Ch D 696, 710 (Jessell MR).

¹³ *Ibid.*

¹⁴ *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 71 [38] (Gummow and Hayne JJ).

of things will bear'.¹⁵ That sentiment was endorsed by the Privy Council two years later and also cited approvingly in Blackstone's *Commentaries on the Laws of England*.¹⁶

It was however questionable whether the common law in the sense used in that proposition bore equity with it. The late Bruce McPherson, who wrote extensively on the recognition of English law abroad, doubted that it did. There was ample support for the view in the 19th century that legislation was necessary to establish a court to administer equity.¹⁷ The problem was recognised and solved very early in our colonial history. The *New South Wales Act 1823*¹⁸ contained a provision that the Supreme Court to be created by the Third Charter of Justice should be a court of equity having all the power of the Lord Chancellor to administer equitable jurisdiction in England.¹⁹ Similar formulae appeared in the statutes of other Australian colonies establishing their Supreme Courts. For Australian purposes therefore, it can, at least plausibly, be said that equity and the law of trusts found their way to Australian shores in a fleet of statutory vessels. I do not nail my colours to their masts however. It is less a question of historical fact than an argumentative proposition which is rhetorically convenient.

III A HISTORY OF ENTANGLEMENT

When equity came, a lot of history came with it including that of the trust, a history entangled with statutes which in part had driven the emergence of its ancestor the medieval use. That entanglement was recognised in the bold description of the use by Professor Gary Watt of Warwick University as

¹⁵ Justice B H McPherson, 'How Equity Reached the Colonies' (2005) 5 *Queensland University of Technology Law and Justice Journal* 108, 109, citing George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence, Chiefly Concerning the Colonies, Fisheries, and Commerce, of Great Britain* (Reed and Hunter, 1814) vol 2, 209.

¹⁶ *Anonymous* (1722) 2 P Wms 75; 24 ER 646; William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) 104–5.

¹⁷ McPherson, above n 15, 110, citing Edward Coke, *The Fourth Part of the Institutes of the Laws of England* (W Clarke and Sons, 1817), cited in *Re Colenso, Lord Bishop of Natal* (1865) 3 Moo PC NS 114, 152; 16 ER 43, 57 (Westbury LC, Cranworth and Kingsdown LJ, Romilly MR and Dr Lushington).

¹⁸ *New South Wales Act 1823*, 4 Geo 4, c 96 ('*New South Wales Act 1823*').

¹⁹ McPherson, above n 15, 110, citing Sir Frederick Jordan, *Select Legal Papers* (Legal Books, 6th ed, 1983) 7–8.

something ‘formed by the arts of ingenious conveyancers applied to certain narrow problems of statutory construction’.²⁰

The use was a device to avoid a variety of things. They included feudal obligations, taxes, creditors and prohibitions imposed by statute. The clergy were among its enthusiastic progenitors. Put shortly, it involved one person conveying legal title to land to another for the benefit of a third. The transferor, known as the feoffor, was the equivalent of what we now call the settlor of a trust. The transferee or feoffee was the equivalent of the trustee. The third party, or *cestui que use*, was the equivalent of the beneficiary. The feoffee, however, was not under any legal obligation to the feoffor. The efficacy of the use depended upon the feoffee not dealing with the land for his or her own benefit or contrary to the purposes for which it was conveyed.

The evolution of the use to the trust involved a partitioning of assets into legal and equitable titles, a partitioning which was not reflected in the civilian jurisdictions. If you look at art 2 of the *Convention on the Law Applicable to Trusts and on Their Recognition*,²¹ you will find a definition in terms which do not require that the beneficiary have a proprietary interest in the trust property. Justice Douglas of the Supreme Court of Queensland in the 2012 W A Lee Lecture said that:

The division of the proprietary interest into legal and beneficial interests, dictated largely by English legal history and the separation between the common law courts and the Chancery courts, lies at the heart of the difficulties civilians have with the concept of the trust.²²

Professor Gary Watt, whom I quoted above, in a book he published in 2009, entertainingly suggested that the medieval European belief in the Trinity and in Judaeo-Christian marriage coupled with the specific religious hypocrisy of English lawyers, set the scene for the emergence of the trust. If you could believe in a three-in-one Godhead and marriage in which two became one, you could believe in one asset with two titles, a fortiori, if you were like many English lawyers of the 13th century who pretended to be

²⁰ Gary Watt, *Equity Stirring: The Story of Justice beyond Law* (Hart Publishing, 2009) 124.

²¹ *Convention on the Law Applicable to Trusts and on Their Recognition*, opened for signature 1 July 1985, 1664 UNTS 311 (entered into force 1 January 1992).

²² Justice James Douglas, ‘Trusts and Their Equivalents in Civil Law Systems: Why Did the French Introduce the *Fiducie* into the Civil Code in 2007? What Might Its Effect Be?’ (2013) 13 *Queensland University of Technology Law Journal* 1, 4.

adherents of the Church of England while at heart remaining Roman Catholics. Such persons 'would have had a natural affinity for the trust, with its distinction between outward form and inner substance'.²³ It is little wonder that in the same year, 2009, Professor Watt was named United Kingdom Law Teacher of the Year.

Perhaps Professor Watt took his inspiration from Frederick Maitland, whose writings have been described in *The Cambridge History of English and American Literature* as having 'a delightful spontaneous sparkle ... on subjects in the treatment of which few readers expect diversion to be blended with instruction'.²⁴ According to Maitland, the concept of the use which became the trust could be traced back to ninth century conveyances of land to bishops for the benefit of their churches and monasteries. The Franciscans evidently applied the device to get around a rule of their order preventing friaries from acquiring property. So that they could provide hospitals and poor houses, land was conveyed to municipal corporations to the use of the friaries.²⁵ The ecclesiastics also sought to avoid the operation of the statutes of Mortmain, including the *Statute De Viris Religiosis 1279*²⁶ which prohibited the conveyance of land to religious corporations in perpetuity without the authority of the Crown.²⁷ Church men encouraged gifts of land to private persons for the use of the church.

The use was also deployed in the 13th century to overcome inconveniences of the feudal system such as 'wardship'. If a land owner at the level of knight service died leaving an heir under the age of 21, the feudal lord would take the heir and the land into wardship and keep all the profits until the heir turned 21. To avoid the windfall to the landlord, the landholder would transfer legal title to a small group who would hold the land for his or her benefit and for whoever the landholder would designate by will. The transfer to the heir could be delayed until he or she reached the age of 21 so avoiding wardship. A statutory response, the *Statute of Marlborough 1267*, provided for the invalida-

²³ Watt, above n 20, 124.

²⁴ A W Ward, 'Historians, Biographers and Political Orators' in A W Ward and A R Waller (eds), *The Cambridge History of English and American Literature* (Cambridge University Press, 1907–21), vol 14, 79.

²⁵ Frederick W Maitland, *Equity: A Course of Lectures* (Cambridge University Press, revised ed, 1936) 24–5.

²⁶ *Statute De Viris Religiosis 1279*, 7 Edw 1 ('*Statute De Viris Religiosis 1279*').

²⁷ Watt, above n 20, 120.

tion of such transfers where they were intended to deprive Lords of their wardships.²⁸ The distinctive feature of the use was that the transferee had legal title to the land. The beneficiary had no interest capable of enforcement by the courts of common law and had no way at law of seeking relief in respect of misconduct by the feoffee whom we would equate with the trustee in modern terms.²⁹ That was to come through the chancery courts. The use was also applied as a device for defrauding creditors and this led to a statute of 1377 designed to limit its availability for that purpose.³⁰ Difficulties caused to purchasers of land seeking certainty of title led to the enactment of a statute in 1484 which gave the beneficiary of a use the capacity to convey the legal estate in the land.³¹

The application of the use to avoid feudal dues and taxes also elicited statutory countermeasures. The *Statute of Uses 1535* was Henry VIII's attempt to overcome the damage to his revenues.³² It provided, in effect, that the beneficiary of a use acquired the legal title to the land thus defeating the whole purpose of the arrangement. The lawyers then created the use upon a use. So a conveyance from A to the use of B, to the use of C, left B holding the legal title by operation of the statute, but B continuing to hold the land to the use of C, who was the intended beneficiary anyway. At least in part, the use was a response to statute and statute responded to the use. As it evolved into the trust, its evolution proceeded through judge-made law, but statute was not entirely silent.

A statute which had a long term effect on the content of equitable doctrines, and which I have already mentioned in passing, is the *Statute of Charitable Uses 1601* also known as the 'Statute of Elizabeth'. It placed private charities under the supervision of the state. Its preamble gave content to the concept of a trust for charitable purposes which echoed through the centuries that followed in England and in Australia even after its repeal in England in

²⁸ *Statute of Marlborough 1267*, 52 Hen 3, c 6 ('*Statute of Marlborough 1267*').

²⁹ See, eg, W S Holdsworth, *A History of English Law* (Methuen, 3rd ed, 1945) vol V, 417. See generally David J Seipp, 'Trust and Fiduciary Duty in the Early Common Law' (2011) 91 *Boston University Law Review* 1011, 1017–18.

³⁰ Austin W Scott, 'The Trust as an Instrument of Law Reform' (1922) 31 *Yale Law Journal* 457, 459.

³¹ *An Act Agaynst Pryvy and Unknowen Feoffement 1484*, 1 Ric 3, c 1. See generally S F C Milsom, *Historical Foundations of the Common Law* (Butterworths, 2nd ed, 1981) 215–18.

³² *Statute of Uses 1535*, 27 Hen 8, c 10 ('*Statute of Uses 1535*').

1881. Its influence was described by Windeyer J in 1971 in *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation*:

What in law is a charitable purpose is to be gathered from the miscellany of objects set out in the preamble to the statute, 43 Eliz, I., c. 4. The spirit and intentment of that enactment, as well as its words, have for centuries dictated the meaning of charity in law.³³

The *Statute of Charitable Uses 1601* was reflected in chancery practice and through that medium informed the construction of later statutes referring to otherwise undefined charitable purposes. Taxation laws in particular incorporated the general law of conception of a charitable purpose derived from the preamble. The leading English case describing that effect was *Commissioners for Special Purposes of the Income Tax v Pemsel* ('*Pemsel*')³⁴ which concerned a provision of the *Income Tax Act 1842* which made allowance in respect of rents and profits of land 'vested in Trustees for charitable Purposes, so far as the same are applied to charitable Purposes'.³⁵ The House of Lords held that the expression 'trust for charitable purposes' and like expressions in the Act were to be construed with the technical meaning given by the English law of trusts. And under the law of trusts, as the High Court reaffirmed in 2010 in *Aid/Watch Inc v Federal Commissioner of Taxation* ('*Aid/Watch*'): 'the purpose must be "within the equity of the preamble to the Statute of Elizabeth"³⁶.

In *Aid/Watch* the High Court was concerned with the question whether provisions of income tax, fringe benefits tax and goods and services tax legislation exempting charitable institutions from taxation extended to an organisation which sought to promote the more efficient use of Australian and multinational foreign aid directed to the relief of poverty. Whether or not the organisation was a charitable institution depended upon whether it fell within the understanding of that term in the law of trusts and, in particular, Lord Macnaghten's speech in *Pemsel* which classified charitable trusts into their four principal divisions: trusts for the relief of poverty, for the advancement of education, for the advancement of religion and for other purposes beneficial

³³ (1971) 125 CLR 659, 671.

³⁴ [1891] AC 531.

³⁵ *Income Tax Act 1842*, 5 & 6 Vict, c 35, s 61 ('*Income Tax Act 1842*').

³⁶ (2010) 241 CLR 539, 547 [13] (French CJ, Gummow, Hayne, Crennan and Bell JJ) (citations omitted).

to the community.³⁷ The High Court observed that the case law which gave the term 'charitable' its technical meaning had developed considerably in response to changed circumstances. The Court said:

Where statute picks up as a criterion for its operation a body of the general law, such as the equitable principles respecting charitable trusts, then, in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time.³⁸

How did the Court see its role in the development of the case law where it is picked up by statute? Where the case law has given rise to a body of doctrine with its own scope and purpose, the development of the doctrine was not to be directed or controlled 'by a curial perception of the scope and purpose of any particular statute which has adopted the general law as a criterion of liability in the field of operation of that statute'.³⁹ The Court concluded that the use of the term 'charitable' in the phrase 'charitable institution' in s 50-5, item 1.1 of the *Income Tax Assessment Act 1997* (Cth) and the corresponding provisions of the *Fringe Benefits Tax Assessment Act 1986* (Cth) and the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) was to be understood by reference to its source in the general law as developed in Australia from time to time.⁴⁰

Another important example of a statute which was taken to incorporate general trust law doctrines was a provision of the *Income Tax Assessment Act 1936* (Cth), considered by the High Court in *Federal Commissioner of Taxation v Bamford* ('*Bamford*').⁴¹ The relevant section provided for a beneficiary of a trust estate presently entitled to a share of its income to be taxed on its share. The Court held that a capital gain, treated by a trustee as income available for distribution, was assessable. The concept of the 'income of a trust estate' in the Act was to be understood according to the general law of trusts.

The observations in *Aid/Watch*, which concerned charitable purposes, were placed in the wider context of statutory and non-statutory law generally with a reference to the High Court's 1999 judgment in *Esso Australia Re-*

³⁷ [1891] AC 531, 583 (Macnaghten LJ).

³⁸ *Aid/Watch* (2010) 241 CLR 539, 549 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

³⁹ *Ibid.*

⁴⁰ *Ibid* 550 [24].

⁴¹ (2010) 240 CLR 481.

sources Ltd v Federal Commissioner of Taxation ('Esso')⁴² concerning the question whether the common law of legal professional privilege could be modified by analogy to accord with provisions of the *Evidence Act 1995* (Cth) relating to the discovery of documents. In *Esso* the Court pointed out that significant elements of what is now regarded as 'the common law' had their origins in statute or as glosses on statute or as responses to statute.⁴³ Examples given were the criminal law of conspiracy, the doctrine of past performance and barriers to equitable remedies applied by analogy to the statutes of limitation. The Court quoted an observation from Professor Atiyah's Chorley Lecture in 1984, the source of the lament about the shambolic state of the common law and statutes, in which Professor Atiyah had expressed scepticism about the development of the common law by analogical reference to statutes. He argued that to use statutes in that way could involve producing results which the legislation did not enact.⁴⁴

While statutes played a part in driving the emergence and development of the use, which became the trust, the law of trusts itself and the creation of the separation between legal and equitable interests, grew up through the common law process. From the 14th century until the 19th century the law of trusts was developed as judge-made law.⁴⁵ There was no specific legislation concerning trusts and almost the entirety of the law could be found in the cases.⁴⁶ Because it was case driven, the creation and enforcement of trusts under the law so developed was not simple and statutes relating to the regulation of trusts, the powers of trustees, and the powers of courts in relation to trusts began to emerge.

From the 1830s a number of Acts were passed in the United Kingdom indirectly related to trusts. The first significant regulatory legislation was the *Trustees Act 1850*,⁴⁷ enacted to facilitate the conveyance and transfer of both real and personal property held by trustees. It provided a mechanism for a replacement trustee. It also dealt with beneficiaries who, because of an

⁴² (1999) 201 CLR 49.

⁴³ *Ibid* 60 [19] (Gleeson CJ, Gaudron and Gummow JJ).

⁴⁴ *Ibid* 60 [20], quoting Atiyah, above n 9, 6.

⁴⁵ Donovan W M Waters, 'The Revision and Modernisation of the Trustee Acts in Canada' in David Hayton (ed), *Modern International Developments in Trust Law* (Kluwer Law International, 1999) 251, 254–7.

⁴⁶ *Ibid*.

⁴⁷ *Trustees Act 1850*, 13 & 14 Vict, c 60 ('*Trustees Act 1850*').

incapacity such as mental illness or minority, were not in a position to enforce their own rights. Further trustee Acts were passed in the 1860s incorporating systematic procedures for the appointment, retirement and resignation of a trustee and a regulated means of transferring property between them. The *Trustee Acts* of 1888, 1893 and 1925 followed.⁴⁸

More recent statutes affecting the operation of trusts in the United Kingdom include the *Trustee Act 2000* (UK) c 29 and the *Contracts (Rights of Third Parties) Act 1999* (UK) c 31. Professor Joshua Getzler has characterised those statutory changes as driving English trust law closer to contract. Notwithstanding that observation, he considers it likely that judicial development of the laws of equity and trusts will end up outpacing legislative programs. He said:

English trust law has always been shaped by cautelar jurisprudence. Private lawyers who counsel clients and draft their deeds and settlements are constantly adapting trusts to new ends, varying conventional trust structures to promote the commercial, tax, investment, family and succession interests of those clients. Courts and legislatures can then choose to tolerate, repress or ratify these experiments, whether on doctrinal or policy grounds. If ratification of new devices is in order, the general default positions of the law can be changed to better reflect dominant legal practice. If the courts cannot engineer the change, the parliament may act in its stead, as with earlier trustee legislation ...⁴⁹

Statutes governing trusts in Australia were inspired by the English legislation and particularly the *Trustee Act 1925* (NSW). State-based statutes amended some equitable doctrines otherwise applicable to trusts. They allowed courts to authorise departures from the trust instrument.⁵⁰ Over time they gave trustees greater powers of investment of trust property than under the general law and conferred on beneficiaries a capacity to question discretionary decisions of trustees. Heydon and Leeming in *Jacobs' Law of Trusts in Australia* have suggested that such provisions virtually rendered the court's

⁴⁸ *Trustee Act 1888*, 51 & 52 Vict, c 59; *Trustee Act 1893*, 56 & 57 Vict, c 53; *Trustee Act 1925*, 15 & 16 Geo 5.

⁴⁹ Joshua Getzler, 'Legislative Incursions into Modern Trusts Doctrine in England: The *Trustee Act 2000* and the *Contracts (Rights of Third Parties) Act 1999*' (2002) 2(1) *Global Jurist Topics* <<http://www.degruyter.com/view/j/gj>>.

⁵⁰ See, eg, *Trustee Act 1925* (NSW) s 81.

inherent jurisdiction with respect to the terms of the trust obsolete.⁵¹ State legislation has also been amended to avoid attempts to limit powers of courts to make orders in relation to trusts, thereby overcoming a restrictive approach adopted by the House of Lords in *Chapman v Chapman*.⁵²

It would not be right to say that the general regulatory statutes in Australia have altered the essential content of the law of trusts or the concept of a trust. There is no doubt, however, that in Australia there have been developments in the use of the trust concept in ways never contemplated when the equitable doctrines described broadly as the law of trusts were developed. Those uses raise questions about the applicability of some of those doctrines to modern arrangements described as trusts. Before returning to that topic, however, something should be said about the definition of a trust, a necessary level of generality and possible distortion in the direction of legal personality.

IV THE DEFINITION OF A TRUST

The case-dense history of the development of the law of trusts gives rise to the difficulty of defining the term 'trust' as explained by Heydon and Leeming in the seventh edition of *Jacobs' Law of Trusts in Australia*:

legal rules are abstracted from the perceived effect of decided cases, many of which will be borderline decisions involving distinctions of degree which cannot be drawn with concise verbal precision. Perhaps the best that can be done is to state the principal or essential distinguishing characteristics of the trust so as to equip the reader to identify, in a general way, what is involved.⁵³

Criteria such as essential and defining characteristics are, of course, well known and much loved in the law if only for their capacity to generate work for lawyers on both sides of the same argument.

The difficulty of a single comprehensive definition has long been recognised. In the fourth of Maitland's *Equity* lectures published in 1936 and entitled 'The Modern Trust', he said to his students: 'No doubt we should like to begin our discussion with a definition of a 'trust'. But I know not where to

⁵¹ J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) 372.

⁵² [1954] AC 429.

⁵³ Heydon and Leeming, above n 51, 2.

find an authoritative definition'.⁵⁴ He proceeded bravely nevertheless, on the basis that '[w]here judges and text-writers fear to tread professors of law have to rush in'.⁵⁵ The best he could come up with was to define the trust in what he called 'some such way as the following':

When a person has rights which he is bound to exercise upon behalf of another or for the accomplishment of some particular purpose he is said to have those rights in trust for that other or for that purpose and he is called a trustee.⁵⁶

The definition was admirably broad. It could encompass express, implied, constructive and resulting trusts and trusts for charitable purposes. It would perhaps even encompass, on a generous reading, commercial trusts and unit trusts. It might well accommodate some species of statutory trusts where the statute uses the trust to attract fiduciary obligations for a particular entity or where a trust arises out of a set of rights and duties created by statute. Professors Ford and Lee's book *The Law of Trusts* adopts a definition which in terms is as broad as and not dissimilar to Maitland's definition.

For the more practically minded and perhaps those who want to be Law Teacher of the Year, there is a website for a commercial organisation offering advisory services to taxpayers which suggests a helpful analogy to their prospective customers:

You could almost liken a trust to a private jet. The jet is put under the control of a pilot (the trustee) to fly the jet while carrying the passengers (beneficiaries) to a destination (when the trust ends, or is 'vested') where the cargo or luggage (assets and property) is unloaded and given to the passengers again. During the flight, the luggage is maintained in the best condition possible and the passengers may occasionally be offered food and drinks if the ticket contract allows it (the beneficiaries may be paid distributions from the trust).⁵⁷

It seems difficult to avoid the conclusion that definitional problems result from the expansion of the use of the trust beyond its historical origins in relation to real property. As Thomas and Hudson have pointed out in the second edition of their text *The Law of Trusts*, trust law concepts, developed

⁵⁴ Maitland, above n 25, 43.

⁵⁵ *Ibid* 44.

⁵⁶ *Ibid*.

⁵⁷ Taxpayers Australia, *How Tax Works: Trusts* (19 August 2014) <<http://www.taxpayer.com.au/KnowledgeBase/10066/Individuals-Tax-Super/Trusts>>.

originally to deal with land, have been applied to personal property and, in particular, intangible property such as money in electronic bank accounts. The task of identifying the subject matter of the trust where intangible property is concerned may be one of some complexity.⁵⁸ Complications may arise when a trust is applied to species of intangible property created or regulated by statute and perhaps subject to dealing constraints — a fortiori where the corpus of the trust is produced from investments procured by the trustee from putative beneficiaries, and protective legislation is engaged. The varieties of modern trusts, including service trusts, unit trusts, discretionary trusts and trusts created by statutes for a variety of purposes require that any overarching definition be expressed at a high level of generality if it is to cover all of them. However, the more general the definition, the greater the doubt about its utility. The definitions in Maitland and in Ford and Lee are probably as good as we can get.

The language of some Australian statutes raises a question about legislative perceptions of the trust relationship. It is not unusual to hear people speak loosely of trusts as though they are a species of legal person. That loose conception is reflected in some legislation. If one were given the following list and were asked to identify the item which does not belong in it, the answer might be fairly straightforward. The list is:

- an individual;
- a body corporate;
- a body politic;
- a partnership;
- an unincorporated association; and
- a trust.

The trust would seem to make the least comfortable fit with the other legal persons or associations of persons. Yet all of those items appear in the definition of 'entity' in s 960-100 of the *Income Tax Assessment Act 1997* (Cth). A note to the definition explains that the term:

⁵⁸ Geraint Thomas and Alastair Hudson, *The Law of Trusts* (Oxford University Press, 2nd ed, 2010) 14.

covers all kinds of legal person. It also covers groups of legal persons, and other things, that in practice are treated as having a separate identity in the same way as a legal person does.

Similarly, the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) defines a federally regulated entity in s 205-15 as including: ‘a trust, all of the trustees of which are constitutional corporations.’ So the trust is put in the same taxonomical box as a variety of legal persons.

In the course of its judgment in *Bamford* the High Court pointed out that while general provisions of the Act spoke of income derived by a person and a trustee would answer that description, the trust itself, in the absence of special provision in the legislation, would not be a separate entity with the distinct character of a taxpayer. The Court referred to an article published in the *Melbourne University Law Review* by Professor Ford in 1958 entitled ‘Income and Estate Taxation Affecting Trusts’.⁵⁹ Professor Ford suggested two methods by which trusts could be dealt with for the purposes of income taxation. The trust could be treated as a separate entity and the income of the trust as a whole assessed as one unit. The rate of tax would be that appropriate to the total taxable income of the trust and the trustees would be assessed in respect of that income. The position of a trust so treated would, in a broad sense, be like that of a company. However, Professor Ford went on to point out that the *Income Tax Assessment Act 1936* (Cth) described a different approach which was implemented by div 6 of that Act and considered by the Court in *Bamford*. That was: ‘the trust could be treated as a mere conduit through which the beneficiaries under the trust receive income’.⁶⁰

While Professor Ford contemplated in his *Melbourne University Law Review* article that a trust might be treated as an entity for income tax purposes that is different from calling it an entity or attaching legal personhood to the trust relationship. The most recent edition of Ford and Lee’s *Principles of the Law of Trusts* states uncontroversially:

when a trust is created it is not accorded legal personality. The trust is no more than a collection of duties, disabilities, rights and powers in relation to some

⁵⁹ H A J Ford, ‘Income and Estate Taxation Affecting Trusts’ (1958) 1 *Melbourne University Law Review* 419, 420.

⁶⁰ *Bamford* (2010) 240 CLR 481, 501–2 [20] (French CJ, Gummow, Hayne, Heydon and Crennan JJ), quoting *ibid*.

specific property imposed upon or accorded to an existing legal person, the trustee ...⁶¹

Professor Sarah Worthington, in an interesting essay on the commercial utility of the trust vehicle, published in 2002, posed but did not answer the question whether the trust should be regarded as an entity. She identified it as a policy question, observing that:

The issue is usually raised in the context of discussions about creditor protection: trusts provide for asset partitioning without notice to the trustee's creditors; companies are obliged to give notice (implied in the corporate name). The policy arguments are similar to those surrounding certain forms of security and security devices.⁶²

It was accepted in *Ford and Lee* that a trust, established as a structure for an investment scheme may, from a commercial viewpoint, look like a company and units issued to the investors may resemble company shares. It is not surprising therefore, that without turning trusts into legal persons, legislation designed to protect the investors is to be found in the *Corporations Act 2001* (Cth) (*'Corporations Act'*). All that being said, statutory designation of the trust relationship as a legal person, even if merely a labelling exercise, is of questionable utility and has the potential to distort the concept in a fundamental way.

The general law of trusts is used in some statutes to provide default rules in connection with the operation of the statutory scheme. Constructional questions may arise about where the statutory rules stop and the general law starts. Chapter 5C of the *Corporations Act*, which deals with managed investment schemes, provides that the responsible entity holds scheme property on trust for the members. The question may then be asked whether what is created is a trust according to general law or something else called a trust in which powers, rights and obligations are primarily defined by statute. At what point does the creation of a so-called statutory trust give rise to a legal and equitable chimera — a beast born of an unholy fusion? Without ascending to that level of colourful metaphor, a related question about the

⁶¹ Ford et al, above n 1, [1.6010].

⁶² Sarah Worthington, 'The Commercial Utility of the Trust Vehicle' in David Hayton (ed), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer Law International, 2002) 135, 159.

powers of responsible entities in their capacity as statutory trustees was considered by the High Court last year and was resolved not by reference to the general law of trusts but by reference to the statute and the constitution of the scheme document.⁶³

Another area in which general trust principles are used as default laws is in the field of superannuation. The *Superannuation Industry (Supervision) Act 1993* (Cth) creates a regulatory regime which enhances the duties of trustees under the general law. Justice Sackville, who wrote about this topic in 2013, observed that:

Equitable remedies available through the judicial process may not provide effective protection to fund members who find that their savings have been (or might well be) dissipated by the trustee's failure to adopt prudent investment strategies, or who are denied investment opportunities because the trustee has preferred, consciously or unconsciously, the commercial interests of an associate over those of the members.⁶⁴

When that Act was introduced it was argued by its proponents in the Parliament that it was merely replicating and confirming the law of trusts and the obligation that it imposed on trustees.⁶⁵ Justice Sackville suggested that such statements be viewed with considerable caution because statutory provisions will almost necessarily differ from common law legal obligation.⁶⁶ Byrne J said in *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* that the language of the statutory provisions do not necessarily reproduce the equitable principles applicable to trustees of superannuation funds.⁶⁷ There are, of course, a number of areas of the law which converge upon superannuation funds. They include equity, contract, employment law, public regulatory law, administrative law and, as has been seen, constitutional law.

⁶³ *Wellington Capital Ltd v Australian Securities and Investments Commission* (2014) 254 CLR 288.

⁶⁴ Ronald Sackville, 'Duties of Superannuation Trustees: From Equity to Statute' (2013) 37 *Australian Bar Review* 1, 4.

⁶⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 December 1992, 3902 (Peter Baldwin).

⁶⁶ Sackville, above n 64, 5–8.

⁶⁷ (2006) 15 VR 87, 108 [107].

V CONCLUSION

If I were asked to list the ways in which statutes and the general law of trusts can interact I would include the following:

- adding new rules to the general law of trusts, eg with respect to trustee's powers or beneficiaries' rights;
- modifying the general law of trusts;
- incorporating the general law or some aspect of it, eg taxation laws and laws relating to the regulation of charities;
- adoption of the general law of trusts as providing default rules subject to statutory regulation of a relationship, eg ch 5C of the *Corporations Act* and the *Superannuation Industry (Supervision) Act 1993* (Cth);
- creating new occasions for the operation of the general law, eg in which a trust may arise;
- creating new species of relationships attracting the application of the general law; and
- designating relationships as trusts.

In addition, the law of trusts must find its place within general regulatory laws governing dealings in the kind of property which is the subject of the trust, insolvency laws relating to voidable preferences, and laws governing the transfer and registration of title to various forms of property. Statutory powers may also be invoked in relation to trust property and recent examples have arisen in connection with the application of freezing provisions of the *Corporations Act* and property division powers of the Family Court applied to discretionary trusts.⁶⁸ All of those potential interactions pose challenges to the aspiration of coherence in the law. There is also a challenge in the aspiration of coherence in the development of the general law itself.

Coherence within the general law is challenged when traditional rules are applied to new forms of trust not contemplated when those rules were formulated. Lord Browne-Wilkinson said of commercial trusts in *Target Holdings Ltd v Redferns* that if they were not to be rendered commercially useless it was important to distinguish between the basic principles of trust law and specialist rules developed in relation to traditional trusts which have

⁶⁸ *Australian Securities and Investments Commission v Carey* [No 6] (2006) 153 FCR 509; *Kennon v Spry* (2008) 238 CLR 366.

no application to trusts of a different kind.⁶⁹ Professor Worthington expressed a similar sentiment when asking whether there was any need for reform of what she called the Anglo-American trust vehicle, she observed that:

Both judicial and extra-judicial argument suggests that the courts need to develop special rules, or at least modify the specialist rules developed in relation to traditional trusts, if the business objectives of the trust are to be properly effectuated.⁷⁰

Such modifications may, of course, be effected by statute in relation to particular kinds of trusts and, a fortiori, to trusts created by statute. Enough has been said to indicate an ongoing challenge to the judiciary and the academy and law reformers and law-makers to aspire to coherence but, at the same time, to recognise that one-size-fits-all rules will not always work. Does this suggest codification? I would be hesitant to say so. That would seem to bring a whole new host of challenges with it. The best that can be said is that we will continue to live in interesting times.

⁶⁹ [1996] 1 AC 421, 435.

⁷⁰ Worthington, above n 62, 162.