THE HON T F BATHURST AC

CHIEF JUSTICE OF NEW SOUTH WALES

BLUE MOUNTAINS LAW SOCIETY SUCCESSION CONFERENCE

SIR ANTHONY MASON ORATION

'DEATH AND TAXES: THE POLICY OBJECTIVES OF SUCCESSION LAW'

SATURDAY 14 SEPTEMBER 2019

1. I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Darug and Gundungurra peoples, and pay my respects to their Elders, past, present and emerging. They have cared for this land for many generations, long prior to settlement by Europeans. We must always recognise, remember and respect the unique connection which they have with this land under their ancient laws and customs.

2. It was a great pleasure to be invited here this evening to deliver the Sir Anthony Mason Oration to this Conference. Sir Anthony is a towering figure in Australian jurisprudence. This is not only because his decisions display an immense depth of learning and perspicuity in legal analysis. He is also responsible for a gradual change in the perception of the judicial role during the closing decades of the 20th century, which parallels the shift which occurred over the course of his own career on the bench.[1] Sir Anthony recognised that judges could not be blind to the wider societal context in which they perform their role, and, where appropriate, should take this into account.[2]

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1 Kristen Walker, 'Sir Anthony Mason' in Tony Blackshield, Michael Coper, George Williams (eds), The Oxford Companion to the High Court of Australia (Oxford University Press, 2001) 459, 459–60.

2 See, eg, Sir Anthony Mason, 'The Role of the Judge at the Turn of the Century' in Geoffrey Lindell (ed), The Mason Papers (Federation Press, 2007) 46, 54–6; Sir Anthony Mason, 'Rights

3. This philosophy underpins many of the most recognisable decisions of the Mason era in the High Court, both in matters of private law, such as *Waltons Stores v Maher*,[3] *Mabo v Queensland*,[4] as well as in matters of public law, such as *Cole v Whitfield*[5] and the implied freedom of political communication cases.[6] In each of these cases, the Court, led by Sir Anthony, accepted that considerations of policy are a relevant touchstone when considering whether to alter, extend, or depart from what has been taken to be established doctrine, whether it be the rules of promissory estoppel or the vagaries of section 92 of the *Constitution*.

4. Even so, not everyone has appreciated the renewed consciousness of the relationship between law and policy for which Sir Anthony was the vanguard. For some, judges who identify and discuss legal "policy" are just one small step away from becoming hopelessly entangled in partisan politics. I think that this criticism is somewhat misconceived. It is an obvious, although often forgotten, point to make, but when we speak about "policy" in a legal sense, we are not talking about judges having the capacity to make policy decisions of the kind made by politicians, which usually involve a freedom of choice between two or more largely incommensurable alternatives.[7] Rather, we are referring to the idea that most legal rules have an identifiable rationale or principle which underlies them.[8]

5. Indeed, when understood this way, I would find it difficult to see how there could be any controversy at all that judges will often need to discuss issues of legal "policy". Whenever a question of statutory

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Values and Legal Institutions: Reshaping Australia Institutions' in Geoffrey Lindell (ed), The Mason Papers (Federation Press, 2007) 80.

3 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

4 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

5 *Cole v Whitfield* (1988) 165 CLR 360.

6 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

7 Cf Sir Anthony Mason, 'The Role of the Judge at the Turn of the Century' in Geoffrey Lindell (ed), The Mason Papers (Federation Press, 2007) 46, 56–7.

8 See Justice R S French, 'Dolores Umbridge and Policy as Legal Magic' (2008) 82 *Australian Law Journal* 322.

construction arises, which happens with increasing frequency nowadays, an authority no less eminent than Sir Owen Dixon has said that "the context, the general purpose and *policy* of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is construed".[9] Even apart from statute, a judge will often be assisted by looking to the rationale or purpose of a general law rule when applying it to new or different circumstances.[10]

6. Nevertheless, judges still need to take care when discussing legal "policy". It is one thing to identify the policy of a statutory provision or a legal rule for the purposes of assisting the resolution of a case. It is quite another to criticise or pass judgment on the merits of the policy which has been pursued by the legislature or the general law. A judge who does so steps outside the appropriate boundaries of the judicial function.[11] While, in some countries, judges often do and may even be required to consider the merits of the underlying policy of a law, this is something which is foreign to Australia's constitutional structure, which vests legislative power in representatives accountable to the people at free, fair and compulsory elections.[12]

7. This system has the advantage of insulating judges from being called to resolve the kinds of political questions which regularly arise in other jurisdictions. But, at the same time, there is a cost. It means that those who are required to administer the law, such as judges and those who practice before them, both of whom therefore might be thought to know a great deal about the law's operation and practical effect, must, in general, refrain from commenting about the merits of the policy which the law pursues. The benefit of their expertise on how the policies

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9 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390, 397 (Dixon CJ), quoted in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ) (emphasis added).

10 For an example, see *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29.

11 *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617, 633 (Mason J).

12 See *Singh v Commonwealth* (2004) 222 CLR 322, 329 [5] (Gleeson CJ).

pursued by statutes and rules of the general law can interact and overlap in real cases is lost.

8. This matters. It is easy to form an opinion on the merits of a policy in the abstract and in isolation from other, competing policies pursued by other areas of law. It is much more difficult to do so when considering the facts of a real, concrete case, which can bring those differing objectives into sharp conflict. Usually, this will mean that a hard decision has to be made which will inevitably disappoint one of the parties to the immediate dispute. However, there is something of a silver lining. In the long-run, these hard cases also provide the opportunity to identify and reflect on just what the overall outcome of the disparate policies pursued by the law actually is. We can then easily pose a critical question: does the law reach the outcome which we would want it to achieve?

9. This having been said, I am certainly not proposing that every judge should be prompted to give their opinion on the merits of how the law works in every case that they decide. As I have said, this would undermine the perception of judicial independence and impartiality upon which our constitutional system depends. But, it does mean that I think there is room for, and perhaps, some benefit from, judges being able to discuss how the overlapping, and often competing, policies pursued by the law are given practical effect, with the aim of encouraging reflection on the critical question which I posed earlier. For this oration in honour of the work of Sir Anthony Mason, that is what I propose to do tonight, in the context of the law of succession.

10. Now, I'm sure that anyone here tonight could run rings around me when it comes to the finer points of practice in relation to drafting wills or estate planning, and I don't propose to give away my ignorance on these matters tonight. I think I will stick to safer territory. Since succession law, by its very nature, lies at the intersection of a number of distinct areas of law with differing policy objectives, I will be focusing on some of the problems which arise in trying to reconcile those objectives by looking at an important moment in the history of succession law, and

what it can tell us about the state of our law today. Hopefully, I will be able to avoid descending into minutiae, so you can put your pens and notebooks away. I will try and keep the analysis general, with the aim of encouraging reflection on whether there are underappreciated tensions between the policy objectives of different areas of succession law.

11. Our first step should be to recognise that these policy objectives have been an important site of legal development throughout the history of the common law. For example, early on, the common law started to protect what we might call the "right" of family members to inherit estates in land regardless of the wishes of the feudal overlord, and later, regardless of any intentions which the deceased might have had about who ought to inherit.[13] Over time, strict rules developed which defined who would become the "heir" to the real property of the deceased, usually based on male primogeniture, subject to certain exceptions to protect other members of the family, such as a widow's right to her "dower", being a life estate in one-third of her husband's land held in fee simple.[14]

12. The differences with the modern position, under which a testator has the power to choose how to dispose of any of their property upon death no matter what its nature,[15] are readily apparent, although, even now, a testator does not have an unqualified right of bequest. For example, creditors have to be paid out of the estate before beneficiaries can inherit, and legacies will abate and the residuary estate will diminish in favour of creditors if the estate is not sufficient. More significantly, there are the claims which family members and other dependents may make under family provision legislation,[16] as well as the power of a court, in

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13 See John Hudson, *The Oxford History of the Laws of England: Volume II: 871–1216* (Oxford University Press, 2012) 349 ff.

14 Sir John Baker, *An Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 290.

15 *Succession Act 2006* (NSW) s 4; see also *Probate and Administration Act 1898* (NSW) s 44.

16 *Succession Act 2006* (NSW) pt 3.2.

certain circumstances, to vary or alter the terms of a person's will where they lack testamentary capacity.[17]

13. Nevertheless, the existence of these exceptions should not be allowed to obscure the fact that the law currently places a high value on the freedom of a testator to choose who will inherit their property, on the basis that, according to Lord Chief Justice Cockburn in *Banks v Goodfellow*,[18] "the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law". But, despite the self-assured and somewhat florid language used by his Lordship, the law was not always this way, as we have seen, and nor was it inevitable that it should have reached this point.

14. To better understand the competing policy objectives at stake in the modern law, it is helpful to look at the historical factors responsible for the shift from a fairly rigid system of rights of inheritance[19] to the more flexible system of the present day based on testamentary freedom. As is the case with many legal developments, presenting the issue in this way involves something of a sleight of hand. In fact, even while the law appeared to deny landowners the right to bequeath their land to whom they chose, the reality was that they exercised a considerable means of control through the use, a legal innovation which was the forerunner of the modern trust.[20] By conveying the land to grantees to be held *to the use of* the grantor and *in accordance with their will*, the grantor could avoid the land becoming subject to the legal rules of inheritance when

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17 *Succession Act 2006* (NSW) pt 2.2. These provisions have recently been considered by the New South Wales Court of Appeal for the first time: see *Small v Phillips* [2019] NSWCA 222.

18 (1870) LR 5 QB 549, 564, quoted in *Re Fenwick* (2009) 76 NSWLR 22, 26 [12] (Palmer J).

19 However, a testator was permitted to dispose of at least part of their personal property by will: see Baker, *Introduction* (n 14) 411–12.

20 The following explanation of the history and development of uses largely follows Baker, *Introduction* (n 14) 267 ff.

they died, while retaining the power to determine to whom the land should descend upon their death in the form of a last will.

15. Of course, the problem was that the obligations imposed on the grantees of the land subject to a use were binding in "trust and conscience" only, and could not be enforced at common law. Prior to the 15th century, they were not being systematically enforced in Chancery either.[21] In legal theory, the grantor "has nothing more to do with the land than the greatest stranger in the world".[22] Against this background, while the desire of landowners to determine who would inherit their land and provide for their family outside the rules prescribed by law is perhaps understandable, it might still seem a little odd that a means of doing so which was unenforceable should have had any attraction. It should therefore come as no surprise that another incentive was lurking behind the scenes, one which will be familiar to anyone who has ever worked in estate planning: taxes.[23]

16. These feudal taxes were levied upon an heir who succeeded to land held by their ancestor at law.[24] But, if the deceased had made a conveyance to uses of part of the land during their lifetime, that land would no longer form part of the inheritance which would descend to the heir. However, since the grantees of the conveyance were bound in conscience to hold that land in accordance with the will of the deceased, if the deceased directed them to hold the land for the use of their heir after death, the heir could still achieve effective control over the land, but without having to pay any tax. If the grantees were joint tenants, and reconveyed the land to new grantees to be held on the same uses if their numbers decreased, land could be kept from being inherited, and thus, from being subject to feudal taxes, almost in perpetuity.[25]

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21 Ibid 270.

22 *Dod v Chyttynden* (1502) B & M 113, 114 (Frowyk sjt).

23 However, Baker has expressed doubt about whether this was the primary motive: see Baker, *Introduction* (n 14) 272.

24 Ibid 258–61.

25 Ibid 272.

17. Over time, as both Chancery and statute intervened to give the beneficiary of land held on uses control over the grantees of the land,[26] uses became more popular and widespread.[27] The effect on the revenues of the Crown, a major feudal landlord, was significant by the time of the early 16th century. Having failed to receive approval from an intransigent House of Commons for new taxation to address this situation, Henry VIII decided to challenge entirely the validity of using conveyances to uses to make wills of land in *Lord Dacre's Case*.[28] Under pressure from the King, the judges unanimously found that it was invalid to devise a conveyance to uses by will, overturning centuries of legal thinking in the process.[29] This quickly brought the House of Commons to the negotiating table, and the compromise which ensued defined the trajectory of succession law for the next several centuries.[30]

18. The first part of the compromise was the *Statute of Uses*,[31] which provided that, wherever there was a conveyance to grantees to be held to the use of a beneficiary, the legal title would pass to the beneficiary rather than the grantees.[32] A landowner could no longer prevent their heir from inheriting their land by conveying it to grantees to be held to their use in accordance with their will. Instead, the *Statute of Uses* "executed" the use so that the legal title remained with them rather than being transferred to the grantees.[33] In effect, this meant that land could only be inherited according to common law rules, and more importantly for Henry VIII, that heirs would be subject to feudal taxes upon

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26 Sir John Baker, *The Oxford History of the Laws of England: Volume VI: 1483–1558* (Oxford University Press, 2003) 661–5.

27 See *Dod v Chyttynden* (1502) B & M 113, 117 (Frowyk CJ), although doubted by Baker, *Introduction* (n 14) 271.

28 *Re Lord Dacre of the South* (1535) B & M 127.

29 For the background to the case, see Baker, *Oxford History* (n 26) 667–72.

30 Ibid 673.

31 27 Hen VIII c 10.

32 See Baker, *Introduction* (n 14) 275. However, there were exceptions where the grantees were subject to active duties, and a later statute was passed to deal with oversights in the original statute: see *Statute of Enrolments* (1536) 27 Hen VIII c 16.

33 *Statute of Uses* s 1.

succeeding to their inheritance, and thus, that the revenue of the Crown would be restored.

19. The second part of the compromise was the *Statute of Wills*,[34] enacted only a few years later, as a concession to lawyers who were threatening to find loopholes in the scheme established by the *Statute of Uses* unless some means were granted by which land could be disposed of by will.[35] For the first time, the *Statute of Wills* granted an express power to a person to dispose of land which they held in fee simple by specified forms of tenure. From this point onwards, there was no turning back. While the statutory power was limited in its application, it was the first of several statutes extending into the late 19th century which gradually created the clear, and prima facie, unqualified, freedom to bequeath land described by Lord Chief Justice Cockburn in *Banks v Goodfellow*.[36]

20. Now, at this stage, you may be wondering why it was necessary to pursue this extended diversion into legal history. My original purpose in doing so was to shed light on the competing policy objectives underlying succession law, but I would not blame you for thinking that all I have demonstrated is that it is a little sadistic to subject you all to what amounts to a crash course in feudal tax avoidance after the main course has been served at 8:45pm on a Saturday night. Even this relatively detailed history has only shown that succession law developed as a bewildering mix of legal technicality and political compromise, with little planning or logic. Searching for guidance here about the state of modern succession law might appear to be a fruitless exercise.

21. However, I do still think that there is something valuable to be learned from this history about the competing policy objectives of different areas of law, and how this contributes to legal development and change. Initially, we can see that the common law exercised close control over the inheritance of land by prescribing strict rules of succession designed

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34 32 Hen VIII c 1.

35 Baker, *Oxford History* (n 26) 679.

36 (1870) LR 5 QB 549, 564.

to avoid the fragmentation of land ownership, which made some sense when land was the main source of economic productivity and social stability. For this reason, it continued to be supported by the landed aristocracy, and was even extended through the development of interests in land with even more restrictive conditions on inheritance, such as fees tail and strict family settlements.

22. This does not deny that there was some desire on the part of landowners, even among the aristocracy, to be able to choose how to dispose of their land between the members of their family, but it seems that there was never a point at which this desire was strong enough to cause a change in the common law rules. Instead, it found expression through an entirely different means in the conveyance to uses, based on the "trust and confidence" reposed in the grantees by the grantor to deal with the land according to their will. There was nothing in the common law which prohibited such uses, and support from Chancery to enforce them was initially sporadic.[37] Nonetheless, it can easily be accepted, perhaps with the benefit of hindsight, that protecting and enforcing obligations arising out of "trust and confidence" is a worthwhile objective for the law to pursue.

23. Now, I think that this illustrates something quite important. While there is nothing necessarily inconsistent in a system of law which both prescribes strict rules of inheritance and permits the enforcement of obligations arising out of "trust and confidence", when pushed to their logical extremes, the different policy objectives supported by each of these different areas of law can come into conflict. There is a tension in how the rationales which underpin each area operate when they are applied in the real world. A conveyance to uses effectively allowed landowners to dispose of their land upon their death, thus circumventing the absence of any power to do so at common law. At the time, it was not possible to say that such a device was either legitimate or

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[37] Baker (n 14) 270.

illegitimate within the framework of the law as it stood: a new decision needed to be made which privileged one objective over the other.

24. Unfortunately, from the idealistic viewpoint with which I began this address, these kinds of decisions are rarely made with a full understanding of their implications. This is because these questions often come before courts in the first instance, who, while they may well appreciate the competing policy objectives at stake, are ill-equipped to make, and are in fact prevented from making, by virtue of their judicial function, the kind of political judgments which those decisions usually require. Instead, they must try to resolve the tension through strictly legal reasoning, which often only defers, rather than addresses, the conflict between the two areas of law.

25. In the long-run, this can have an unfortunate effect. It leads to a tendency to treat the law merely as an instrument to be used to an end, rather than as something which serves to achieve policy objectives in its own right. This can be seen quite clearly in how the tension between the strict rules of inheritance at common law and the conveyance to uses was resolved. The real concern which motivated the "reforms" to this area introduced by Henry VIII was his need to finance the government of England,[38] and it was the conveyance to uses which stood in the way by depriving him of revenue from feudal taxation, which was based on the increasingly antiquated idea that tenure of land was an incident of the feudal relationship between lord and vassal.[39]

26. Thus, Henry VIII engineered the result in *Lord Dacre's Case* to bring the House of Commons to the negotiating table, passed the *Statutes of Uses* to reimpose liability on the heirs of land to pay the neglected feudal taxes, and then passed the *Statute of Wills* as a concession to remove any incentive anyone might have to threaten the restored stream of revenue. The effect of these events on the development of the

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38 See Baker, Oxford History (n 26) 664–5.

39 See generally Hudson (n 13) 334–47.

common law has been immense,[40] and not always for the better. They generated much legal complexity in the years after they were adopted,[41] without doing anything to resolve the central policy issues which had motivated them. While an approach which gave less priority to naked financial need and more to matters of policy might not have satisfied Henry VIII, it might have resulted in a clearer, and more coherent, system of law.

27. Now, times have changed. The landscape of succession law, and indeed, our legal system as a whole, is very different to what it was in the 16th century. And yet, I cannot help but see some similar patterns, relating, in particular, to the use of trusts in the succession context. While they are no longer necessary to enable a testator to dispose of their land by will,[42] their use as a means of estate planning has remained popular, and the reason for their popularity has changed little since the heyday of the conveyance to uses in earlier times. By drawing a distinction between the legal and beneficial ownership of property in a unique way,[43] the presence of a trust makes it much more difficult to apply legal rules designed with a singular concept of ownership in mind. It is usually necessary to deal with the problems posed by trusts with tailor-made legal rules in order to achieve the desired outcome.

28. This raises the same questions we encountered with conveyances to uses. The law serves an important policy objective when it regards a trustee or trustees as bound in conscience to perform the terms of the trust. But other areas of law serve competing policy objectives. A right to seek provision out of a deceased estate upholds the "moral claims" of

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40 See, eg, E W Ives, 'The Genesis of the Statute of Uses' (1967) 82 *English Historical Review* 673, 673.

41 The *Statute of Uses* continued to be relevant through the 17th century, even though the *Military Tenures Abolition Act 1660*, 12 Car II c 24 removed the system of feudal taxation which had originally been its justification: see Baker, *Introduction* (n 14) 277.

42 *Succession Act 2006* (NSW) s 4.

43 See J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis, 8th ed, 2016) ch 2 ("The Distinction Between a Trust and Certain Other Legal Institutions").

family and dependents to a measure of support from the deceased.[44] A right to have a debt paid out of the assets of a bankrupt estate prevents a bankrupt from defrauding their creditors.[45] A right to share in the financial assets of a spouse upholds a standard of fairness and justice between the parties to a relationship.[46] Through the use of a well-drafted testamentary trust, or through an inter vivos settlement designed to achieve a similar effect, a testator could frustrate the objectives of each of these areas of law by providing the beneficiaries under the trust with the benefit of their assets without necessarily vesting legal entitlement in them or giving them effective control.[47]

29. However, perhaps the most significant difficulties occur in relation to income taxation, where the legislature has long grappled with the problems arising out of the use of trusts to accommodate tax-effective intergenerational transfers of wealth. Indeed, from its humble origins when it only covered a mere two printed pages, Division 6 of the *Income Tax Assessment Act 1936* (Cth) has expanded to include over forty pages in its own right, and several hundred pages if the subsequent divisions dealing with associated topics relating to trusts are included. These provisions have developed piecemeal over the intervening decades to address particular problems which have arisen in taxing income connected with trusts, and do little to resolve the underlying policy tension.

30. As it was with the conveyance to uses, the heart of the problem lies in the fact that a beneficiary under a trust can normally still exercise a great degree of control over the assets of the trust, whether directly under a "fixed" trust,[48] or perhaps more indirectly under a "discretionary"

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44 *Succession Act 2006* (Cth) ss 59–60.

45 *Bankruptcy Act 1966* (Cth) s 56.

46 *Family Law Act 1975* (Cth) s 79; *Kennon v Spry* (2008) 238 CLR 366.

47 See, eg, Vik Sundar, Charles Rowland, Phillip Bailey, *Testamentary Trusts: Strategies and Precedents* (LexisNexis, 2nd ed, 2016).

48 Depending upon the nature of the entitlement under the trust, this could well be a "present entitlement for the purposes of *Income Tax Assessment Act 1936* (Cth) s 97.

trust.[49] However, it is difficult to define precisely what degree of control is necessary to incur liability for taxation, even though anti-avoidance provisions, and a court's power to look behind transactions which are "shams", do provide some assistance.[50] But, even if we take the case of a discretionary trust with a wholly independent and disinterested trustee, I think there can be real questions about how to treat the "mere expectation" of a benefit which the beneficiaries have under such a trust.[51] No matter which way you look at it, the primary advantage of such arrangements is to try and insulate assets from being counted as income or property of the beneficiaries until it is convenient to do so.

31. As I have said, I aim to do no more than point out that this arises from a tension between two competing policy objectives. On the one hand, enforcing and giving effect to a trust upholds the importance of relationships of "trust and confidence" in our society. On the other, ensuring that a person who has access to financial benefits is taxed appropriately also upholds important principles of fairness and equity in our society. Just as with conveyances to uses and testamentary freedom in earlier times, there is no one right answer as to which objective the law should favour. However, it is important that we are aware of these conflicts and inconsistencies, and that we consider carefully what principled approach we wish the law to take.

32. I would add one last comment. It may seem that I have been rather critical of governments and legislatures who make decision on law reform for what might charitably be described as "pragmatic" reasons. This has not been my intention. It would be naïve to assume that the passage of every piece of legislation could possibly be entirely the subject of considered reflection rather than compromise. But, merely

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49 If a trust can be classified as "discretionary", a beneficiary is deemed to be "presently entitled" when the trustee exercises their discretion in favour of the beneficiary pursuant to *Income Tax Assessment Act 1936* (Cth) s 101.

50 *Income Tax Assessment Act 1936* (Cth) pt IVA; *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516. However, there may be forensic reasons for not relying upon these avenues to the full extent: see, eg, *Raftland* at 525 [8].

51 Cf Heydon and Leeming (n 43) 569 [23-15]. .

because things often happen in this way does not mean that it produces the best results, or that we should not reflect on how we could do better.

33. Thank you.